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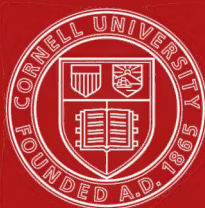
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REPORTS OF CASES
DETERMINED IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES
OF
OREGON AND CALIFORNIA.

BY MATTHEW P. DEADY,
UNITED STATES DISTRICT JUDGE,
OREGON.

1859--1869.

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P R E F A C E .

IN submitting this volume of reports to the profession, a word of explanation in regard to the organization of the Courts, in which the cases were decided, is deemed proper. The District Court, in Oregon, was organized in September 1, 1859, under the Act of March 3, of that year, (11 Stat. 437), and had Circuit Court powers and jurisdiction until the creation of a separate Circuit Court for the district, by Act of March 3, 1863, (12 Stat. 794). The cases entitled in the Circuit Court for the District of California, were decided while I held that Court during portions of the years 1867-8-9, in pursuance of the designation of Justices CHASE and FIELD of the Supreme Court.

MATTHEW P. DEADY.

Portland on Wallamet, January, 1872.

ERRATA

- On page 4, line 17, for "therefrom" read "therefore."
" page 32, line 8, for "new" read "mere."
" page 100, foot note, for "58" read "72."
" page 104, title of Court, for "District" read "Circuit."
" page 145, line 15, for "donor" read "donee."
" page 150, foot note, for "39" read "14."
" page 163, foot note, for "39" read "1."
" page 166, line 35, for "facilitate" read "facilitating."
" page 173, line 10, for "nro" read "nor."

TABLE OF CASES REPORTED.

	PAGE.
A.	
Austin, Hall <i>v.</i>	164
Active, The.....	165
Avery, United States, <i>ex rel. v.</i>	204
Almatia, The.....	473
B.	
Bryant, <i>In re.</i>	118
Byrne <i>et al.</i> , Hinckley <i>et al. v.</i>	224
Bowman, Mariposa Co., <i>v.</i>	228
Bennett <i>v.</i> Bennett.....	299
Barney <i>et al.</i> , Parrott <i>v.</i>	405
Burk, <i>In re.</i>	425
Brown, United States <i>v.</i>	566
Briscoe <i>v.</i> Hinman.....	588
C.	
Christina, The....	49
Chapman <i>v.</i> School District No. 1 <i>et al.</i>	108
Chapman <i>v.</i> School District No. 1 <i>et al.</i>	139
Cardinel <i>et al. v.</i> Smith <i>et al.</i>	197
Crawford <i>v.</i> Johnson <i>et al.</i>	457
Correy <i>et al.</i> , <i>v.</i> Lake <i>et al.</i>	469
City of Portland <i>et al.</i> , Lownsdale <i>v.</i>	1
City of Portland <i>et al.</i> , Lownsdale <i>v.</i>	39
Coulson <i>et ux.</i> , <i>v.</i> City of Portland <i>et al.</i>	481
City of Portland <i>et al.</i> , Coulson <i>et ux. v.</i>	481
D.	
Dodge, United States <i>v.</i>	124
Dodge, United States <i>v.</i>	186

Davenport, United States, <i>v.</i>	264
Davis, United States <i>v.</i>	294
Dick, Hamilton <i>et al.</i>	322

E.

Eldridge, The.....	176
--------------------	-----

F.

Fideliter, The.....	620
Fox, United States <i>v.</i>	579
Fields <i>v.</i> Lownsdale <i>et al.</i>	288
Fields <i>v.</i> Squires.....	366
Fields <i>v.</i> Lamb <i>et al.</i>	430

H.

Hall <i>v.</i> Austin.....	104
Hinckley <i>v.</i> Byrne <i>et al.</i>	224
Hamilton, <i>et al.</i> , Starr <i>v.</i>	268
Hamilton, Dick <i>v.</i>	322
Hendy <i>v.</i> Soule.....	400
Howland <i>et al.</i> <i>v.</i> Soule.....	413
Hazlette <i>v.</i> Lake.....	469
Hinman, Briscoe <i>v.</i>	588

J.

Jenny Jones, The.....	82
Johnson <i>et al.</i> , Crawford <i>v.</i>	457

K.

Kallich, <i>In re.</i>	575
------------------------------	-----

L.

Lownsdale <i>v.</i> City of Portland <i>et al.</i>	1
Lownsdale <i>v.</i> City of Portland <i>et al.</i>	39
Lampman, Pendergrast <i>v.</i>	54
Lownsdale <i>et al.</i> , Fields <i>v.</i>	288
Lamb <i>et al.</i> , <i>v.</i> Starr <i>et al.</i>	350
Lamb <i>et ux.</i> , Fields, <i>v.</i>	430
Lamb <i>et al.</i> , <i>v.</i> Starr <i>et al.</i>	447
Lake <i>et al.</i> , Correy <i>et al.</i> <i>v.</i>	469
Lake, Hazlette <i>v.</i>	469

M.

Maria, The	89
Mayer, United States v.....	127
Martinetti <i>et al.</i> v. Maguire <i>et al.</i>	216
Maguire <i>et al.</i> v. Martinetti.....	216
Mariposa Co. v. Bowman.....	228
McCall v. McDowell <i>et al.</i>	233
McDowell, McCall v.....	233
Mercer <i>et al.</i> , United States v	502
Muller <i>et al.</i> , <i>In re</i>	513

N.

Newby v. Oregon Central Railway <i>et al.</i>	609
---	-----

O.

Oregon, The.....	179
Orizaba, The	196
Olney, United States v.....	461
Oregon Central Railway <i>et al.</i> , Newby v.....	609

P.

Pacific, The.....	17
Panama, The.....	27
Pendergrast v. Lampman.....	54
Pioneer, The.....	58
Pioneer, The.....	72
Pacific, The.....	192
Parrott v. Barney <i>et al.</i>	405

R.

Ranier, The.....	438
Randall, United States v.....	524
Randall <i>et al.</i> , <i>In re</i>	557

S.

School District No. 1, <i>et al.</i> , Chapman v.....	108
School District No. 1, <i>et al.</i> , Chapman v.....	139
Smith <i>et al.</i> , Cardinel v.....	197
Starr v. Hamilton <i>et ux</i>	268
Sutherland, <i>In re</i>	344
Starr <i>et al.</i> , Lamb <i>et al.</i> , v.....	350
Squires, Fields v.....	366

Soule, Hendy.....	400
Soule, Howland <i>et al.</i> v.....	413
Sutherland, <i>In re</i>	416
Starr <i>et al.</i> , Lamb <i>et al.</i> v.....	447
Sutherland, <i>In re</i>	573
Spaulding v. Tucker.....	649

T.

Ten Cases Opium.....	62
Tucker, Spaulding v.....	649

U.

United States v. Dodge.....	124
United States v. Mayer.....	127
United States v. Dodge.....	186
United States <i>ex rel.</i> v. Avery.....	204
United States v. Davenport.....	264
United States v. Walsh.....	281
United States v. Davis.....	294
United States v. Olney.....	461
United States v. Mercer <i>et al.</i>	502
United States v. Randall.....	524
United States v. Brown.....	566
United States v. Fox.....	579

W.

Wallace, <i>In re</i>	433
Walton <i>et al.</i> , <i>In re</i>	442
Walton <i>et al.</i> , <i>In re</i>	510
Whitmore, <i>In re</i>	585
Wright, The.....	591
Walton <i>et al.</i> , <i>In re</i>	598

Y.

Yankee, The Live.....	420
-----------------------	-----

CASES DECIDED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

DISTRICTS OF OREGON AND CALIFORNIA.

IN THE DISTRICT COURT OF THE DISTRICT OF OREGON,
JANUARY 8, 1861.

J. P. O. LOWNSDALE *v.* THE CITY OF PORTLAND,
GEORGE C. ROBBINS, JACOB DAVIDSON, A. D.
SHELBY, JACOB STITZEL, WILLIAM S. HIGGINS,
J. C. AINSWORTH, M. M. LUCAS, E. D. SHATTUCK,
ABSALOM B. HALLECK, ORVILLE RISLEY, AND
JAMES H. LAPPEUS.

A decree in a suit between P., a lot-holder in the town of Portland, and L., C. and C., settlers upon the Portland land claim, declaring a certain strip of land to have been dedicated to the public, cannot be pleaded as an estoppel in a suit by the grantee of L. against the town of Portland, concerning a portion of the same premises—the municipal corporation and P. are not privies.

The decree pronounced by the Supreme Court of the late Territory of Oregon, at the term of June, 1854, in the suit of *Parrish v. Lownsdale, Coffin and Chapman* is void, because neither party to the suit had any interest in the land in controversy by which the Court could obtain jurisdiction to make the same.

The decree in the Parrish suit was not a decree *in rem*, but *in personam*, and the manner of pleading it cannot change its character in this respect.

The Act of Congress of August 14, 1848, (9 Stat. 323), organizing the Territory of Oregon did not extend the Act of May 23, 1844, (5 Stat. 657), com-

J. P. O. Lownsdale v. The City of Portland, and others.

monly called the Town Site Law, over the Territory; but the first Act of Congress affecting the title or disposition of lands in Oregon was that of September 27, 1850 (9 Stat. 497), commonly called the Donation Act.

Under Section 14, Act of August 14, 1848 (9 Stat. 329), which provides that the laws of the United States should be in force in the Territory of Oregon, "so far as the same, or any portion, may be applicable," the power is devolved upon the Court, when the question arises, to determine what laws are "applicable" and what are not; and in determining this question, the Court is not bound by any construction which the administrative department of the Government may have given to such provision, in the discharge of its duties.

A settler on the public lands in Oregon—prior to September 27, 1850—held the mere possession thereof, under what was known as the "Land Law" of the "Provisional Government of Oregon;" the interest of such settler in the land ceased with his occupation, and when he abandoned or transferred the possession to another, that other took it as though it had never been occupied; nor could the first settler, by any act of his, charge such lands, in the possession of the second one, with any easement or incumbrance whatever.

A dedication to public uses, by a release, upon condition that a pending suit concerning the premises shall be dismissed, does not take effect in case said suit is not dismissed.

A dedication to public uses by a release, without covenants, by a person who is a mere occupant of the public land, without other estate or interest therein than the bare possession, does not bind an after-acquired estate in the same premises.

Where an answer to a bill in equity is excepted to for impertinence, if the matter excepted to be in response to the bill, the exception will not be allowed, though the matter be impertinent.

DEADY, J. This is a suit in equity to quiet title. The bill alleges that the complainant is a citizen of Indiana, and seized in fee of lots numbered 1, 2 and 3, in block 74, in the town of Portland, and has been so seized and occupied the same since January 1, 1853; and that about July 1, 1860, he commenced to improve said lots by the erection of wharves thereon, and that he continued to make said improvements without let or hindrance from the defendants until about the time of filing the bill herein—November 9, 1860—when the defendants threatened to destroy and remove the same, and did proceed to put said threats into execution, by arresting his agents and workmen while engaged in erecting said improvements; and that the defendants have no right, title, or interest in or to the premises, and that the proceed-

J. P. O. Lownsdale v. The City of Portland, and others.

ings of the defendants impair the value of the premises, and are to the irreparable injury of the complainant.

Afterwards complainant filed an amended bill, upon which a provisional injunction was allowed until the further order of the Court, enjoining the defendants as prayed for in the bill. To this amended bill the defendants filed an amended answer, to portions of which complainant filed eight exceptions for impertinence.

In considering these exceptions, this answer must be treated as a whole. Much of the matter to which the exceptions go might have been pleaded as pleas, but the defendants under the option given them by the equity rule 39, have pleaded them by way of answer. An answer in equity being necessarily a unit—a whole—the attempt to plead certain parts of it separately, by calling them “counts in equity,” does not change its character in this respect. Indeed, such a thing as “a count” is not known to equity pleadings. The phrase belongs to the common law, and even then applies only to the pleadings of the plaintiff. Wherever, then, matters alleged in one of the “counts” in the answer, is contradicted by the allegations in another “count” or portion of the answer, for the purpose of these exceptions such allegation is considered as untrue.

The answer denies the service, possession and occupation of the complainant, and then “for further plea and answer,” by way of what is called in said answer a “count in equity,” pleads a decree of the Supreme Court of the late Territory of Oregon, pronounced at the term of June, 1854, of said Court in a suit in equity, wherein J. L. Parrish was complainant and Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman were defendants. The said “count” recites from the pleadings in said suit, that in 1850 said Parrish, having before that time purchased a block of lots fronting on Water street, in said town of Portland, filed a bill in chancery, praying an injunction against said defendants, because said defendants were about erecting buildings on the strip of land adjoining the Wallamet river, in front of said block, to the irreparable injury of said Parrish.

J. P. O. Lownsdale v. The City of Portland, and others.

That Pettigrove and Lovejoy, the former claimants of the town site, had, in laying out said town, dedicated said strip of land to public use as a levee. That the defendants L., C. and C., answered said bill, denying said dedication, and that upon the hearing, the Court aforesaid, found and decreed, that the strip of land was so dedicated, and that the same was a part of Water street, and perpetually enjoined the defendants from erecting obstructions on the same. The said "count" further alleges that the town of Portland had notice of said suit—that it was a party in interest, and employed one McCabe to appear for it in Court; and that the complainant has no other title or interest in the premises than what he has derived from D. H. L., aforesaid, by conveyance long after the commencement of said suit; and that the premises in question are a part of said levee of Water street, declared by said decree to have been dedicated to public use, and that therefrom the complainant is estopped to claim the contrary.

This "count" or portion of the answer is excepted to as impertinent, because it appears that the decree therein pleaded was pronounced between different parties; and if this were otherwise, because it appears such decree is void, the Court that gave it not having jurisdiction of the subject matter, because, at the commencement of said suit, no law had been passed by Congress whereby anybody could acquire any title to or interest in lands in Oregon.

On the contrary, the defendants insist that the decree is a valid subsisting decree—that the present defendants are privies of Parrish, and that therefore the decree is a bar to the relief sought by the complainant. The rule of law claimed by defendants is admitted. When a Court of competent jurisdiction has determined a controversy or question, the parties thereto, their privies in blood, law and estate, are bound by it, and estopped from asserting in any Court the contrary. But the estoppel must be mutual and bind both parties—the party who relies upon it as well as the party against whom it is alleged. It is admitted, that as to the premises in controversy, the complainant is a privy in

J. P. O. Lownsdale v. The City of Portland, and others.

estate with D. H. L., but denied that the defendants are privies in estate with Parrish.

If the parties are privies at all, they are privies in estate. In support of the proposition that the defendants were parties to the Parrish suit, effect is sought to be given to the allegation in this "count," that the defendants were parties in interest therein, and employed counsel to appear for them. If, by the phrase *party in interest*, it is meant to assert that the town was a party to the Parrish suit in the usual and legal sense, by being a party on the record, then the allegation is shown to be untrue, because it appears from the answer itself that Parrish was the sole complainant on the record. But if the words are used in the sense that the town had an *interest in the question* involved in it, by reason of having a like claim to an easement in this or other property similarly situated, then they signify nothing, because to be interested in the question determined by a suit, in no way makes the town a party to it. If, in a suit between A and B, the question is, whether a conveyance of Black acre by a deed not duly acknowledged passed the estate to the vender, and there should be a hundred other persons having conveyances to land in the same State, similarly executed, they would all have an interest in the question involved in the suit between A and B, because the law as determined in that case would be the rule for like cases, but still they are not parties to the suit, or in any way estopped by the determination of it.

As to the employment of counsel by the town, the record, as set up in the answer, shows that the counsel spoken of appeared for Parrish, and not for the town. I suppose the fact is that the town, after its incorporation, thinking, so to speak, that it had an interest in the question, or *being so advised by counsel*, contributed something to stimulate his efforts as the solicitor of Parrish. The case is the same as if the hundred persons in the instance supposed had contributed money to employ counsel to argue B's side of the controversy between him and A, for the purpose of procuring a determination thereof, which, as a precedent,

J. P. O. Lownsdale v. The City of Portland, and others.

would be favorable to themselves. This would not make them parties to the suit.

But there is a fact stated in the answer which makes it legally impossible that the town could have been a party to the Parrish suit; and that is—the town was not incorporated until 1851—after the commencement of such suit. A party to a suit must be either a natural person or persons or a legal entity, as a corporation created by or in pursuance of law. The town of Portland had no legal existence before its incorporation. How, then, could it be a party to a suit before that time? As well might an unborn child be called a party to a suit. At the commencement of the Parrish suit, there may have been people living in the place called Portland, and in the common parlance of speculators in lots, the *place* may have been called a *city*; but none of these persons except Parrish were parties to his suit, and the municipal corporation since created and styled “the city of Portland,” which now represents the inhabitants of the place, as defendant to this suit, did not then exist.

Neither is there any privity in estate between the defendants and Parrish. They do not claim through or under him. The suit of Parrish was brought upon the ground of a private right in him to have the levee left open so the public could have free access to his, Parrish’s, premises; and that if the defendants, L., C. and C., were allowed to obstruct the levee in front of his premises, and thus prevent the public from reaching his place of business, it would depreciate the value of his property and thus do him a private injury. To my mind it is as plain as that two and two make four, that the town of Portland was not a party to the Parrish suit, nor in any way a privy in estate with him. The town would not be estopped by this decree, and as estoppels must be mutual, neither can the complainant be.

As to the second point made by the complainant in support of this exception, I do not think that I can take judicial notice that the case of *Parrish v. Lownsdale et al.* (21 How. 290), is the same as the one pleaded in the answer.

J. P. O. Lownsdale v. The City of Portland, and others.

But, of course, the principle laid down in that case is applicable to like cases and of binding authority in this Court. The Supreme Court, in that case, dismissed the appeal, because the subject of the controversy as to the parties to the suit had no value. Why had it no value? Because, in the language of the Court, "neither party had any title or interest in the land whatever." They had no interest in the land because, says the same authority, "Congress passed no law in anywise affecting title to lands in Oregon Territory till September 27, 1850," and before that time this suit was commenced.

Under this state of facts and law had the Territorial Court jurisdiction of the subject matter? To answer this question, it would seem to be enough to ask what *was* the subject matter of the suit? It was the alleged interest of the parties in this land; but as neither had any interest in it, there was nothing upon which the Court had the power to adjudicate. From these premises it necessarily follows, that the decree of the Territorial Court in the Parrish suit is void, and neither binds nor affects anybody. The first exception must be allowed.

The second exception is taken to that part of the answer, pleaded as a second "count in equity." In it the Parrish suit and decree is again set up in bar of this suit, without the allegations relative to the town being a party in interest and having employed counsel.

It is difficult to understand the object of pleading the same decree twice in the same answer; but I believe the learned counsel for the defendant insists, that this decree, as pleaded in this so-called "count in equity," has become, in some occult way, an adjudication *in rem*, and binds all the world. If such is the effect of this decree by simply pleading it *twice*, it would be a curious question in *legal alchemy* what might be the result of pleading it *twice*. A judgment *in rem* is given in a proceeding in courts of admiralty and the Court of Exchequer; the suit is against the thing and therefore called *in rem*, as a ship claimed as prize or liable for seamen's wages or goods forfeited for being

J. P. O. Lownsdale v. The City of Portland, and others.

imported contrary to the revenue laws, and the judgment of the Court is given directly against *the thing*, and determines the status, and all questions of ownership or property dependent thereon, from thenceforth. From the necessity of the case—for the convenience of commerce, to this judgment all the world are said to be parties, and therefore bound by it. During the pendency of the suit, any one may come into Court, prefer a claim to the thing or an interest in it, and be heard and control the proceedings; and if any one having such a claim or interest omits to do so, he is properly deemed to acquiesce in what takes place. But in a criminal proceeding, at the suit of the King in the Exchequer, against a person for an unlawful importation of goods, although the question of unlawful importation is passed upon, the judgment of the Court is not *in rem* but *in personam* against the wrong-doer, and does not determine the ownership of the goods.

In no sense was this a decree *in rem*, it was pronounced in a suit *in personam* against the personal defendants, L., C. and C. This “count” is nothing but the first “count” repeated with the omissions mentioned. The exception to it is allowed.

The third exception includes so much of the answer as is called therein the fourth “count in equity.” Substantially it alleges, that in 1845, a number of persons occupied the present site of Portland, and laid out a town thereon for the purposes of trade and commerce; and that said persons and others, the inhabitants of Portland, have always used said levee as a public easement, except certain portions of the same wrongfully occupied by private persons. That the Territory of Oregon was organized by Act of Congress of August 14, 1848, by virtue of which Act, the Act of Congress of May 23, 1844, commonly called the Town Site Law, was extended over Oregon. That on January 23, 1851, the town of Portland was incorporated, and that in 1852, the United States surveys were extended over the place. That in 1858 the town of Portland, entered at the proper land office, the present site of Portland, under the Town Site Law of 1844;

J. P. O. Lownsdale v. The City of Portland, and others.

and that in 1860, the town received a patent therefor from the United States for the purposes provided in the Act of 1844. That complainant derives title to the premises from D. H. L., and that the title of the latter is founded upon his entry of March 11, 1852 under the Donation Act of September 27, 1850; but that said land was not subject to be taken as a donation under the Act of 1850. That said D. H. L. acquired no title by said entry, but that said land was vested in the occupants thereof under the Act of 1844, and that the premises in controversy are within said entry by the town.

Counsel for the complainant insists that the matters above stated are no bar to the relief sought, because the Act of 1844 was not in force in Oregon at the time of the donation entry of D. H. L., and if it was in force, the town is seized only as trustee "for the benefit of the occupants thereof according to their respective interests," and that the complainant is the occupant of the lots in question, and that his interest under the Town Site Law includes the estate in said lots, except the naked legal title held by the city as trustee for his benefit.

For the defendant it is contended that by the provision of the Act of August 14, 1848, which "declared the laws of the United States extended over" and "in force in said territory, so far as the same or any provision thereof, may be applicable," that the Act of 1844 was extended to Oregon, and the decision of the general land office and the issuance of this patent, are relied on as authority for such construction of the Act of 1848. That an occupant, under the Town Site Act of 1844, in his right of selection as to the particular place he will occupy, is subordinate to, and must be governed by the law of the community constituted of the occupants of the town; and that such portions of the town site as this community may designate as streets or public grounds *for that reason become so*, and are not open or subject to individual appropriation and occupation.

J. P. O. Lownsdale v. The City of Portland, and others.

The limit of individual right of occupation under the Town Site Act is difficult to determine. The difficulty lies principally in the meagreness and inadequacy of the Act to the regulation of the subject. When a number of persons, coming together fortuitously, settle down upon a tract of public land and gradually build up a town, it is difficult to find any authority in the Act of 1844 by which any number of said occupants can constrain any less number to occupy more or less of said land, or in this or that place. I suppose the Act was originally passed as a special and temporary measure, to meet the case of some town already built up on the public lands, and it adopted the state of things as to the division into streets and lots then existing there. But it is not necessary to pass upon this question, because the answer denies the seizin and occupation of the complainant, and for the purposes of this exception that denial must be taken as true. Assuming, then, that the complainant is not an occupant of the premises, if the Town Site Act was in force in Oregon, by virtue of the provision of the Act of August 14, 1848, then the complainant would be without right or interest in the premises, and therefore not entitled to the relief sought.

This leads to the consideration of the question whether the Town Site Act was in force in Oregon prior to the time it was specially extended here by Act of July 17, 1854. Its operation since that time could not, I conceive, affect the rights of the parties to this suit, because it appears that D. H. L. entered the land in question under the Donation Act of 1850, as early as March 11, 1852. The question must, therefore, be determined in accordance with the law in force at and before the time of that entry.

When Congress, in organizing the Territory of Oregon, by the Act of 1848, declared that the laws of the United States should be in force in said Territory, "so far as the same, or any provision thereof may be applicable," it did not mean that any particular one of such laws should be in force here, but only such as should be *determined* "to be applicable." Under this state of things, so far as the rights

J. P. O. Lownsdale v. The City of Portland, and others.

of person and property are concerned, authority is necessarily given to the Courts, and it becomes their duty, whenever the question comes before them, to decide what laws were applicable and what not; and, consequently, what were in force and what not. Doubtless the administrative department of the Government—the general land office, for instance—charged with the authority and duty of disposing of the public lands in this territory, may be called upon to decide the same question. But I respectfully submit that such decision does not conclude the Courts in a proper case, where the parties are before the Court claiming under conflicting or any laws of the United States, from deciding what laws were *applicable* to the territory at a particular time, and consequently in force, and what were not, independently of said decision, or even adversely to it.

It is well known that at the time of the organization of the Territory of Oregon, by the Act of 1848, an anomalous state of things existed here. The country was extensively settled, and the people were living under an independent provisional government established by themselves. They were an autonomous community, in the full sense of the term, engaged in agriculture, trade, commerce, and the mechanical arts; they had built towns, opened and improved farms, established churches and schools, laid out highways, passed revenue laws, levied and collected taxes, made war and concluded peace by their own authority. From the necessity of their condition, and as the corner-stone of their government and social fabric, they had established a "Land Law," regulating the possession and occupation of the soil among themselves.

That all this was known to Congress, at the time of the organization of the territory, would be highly probable from its historic importance, and is certain to have been so from the language of sections 14 and 17 of the Act of 1848.

The leading feature of the Land Law of the Provisional Government, was that which provided that every male inhabitant of the country, over a certain age, might occupy and possess 640 acres of land. The uses that the land might

J. P. O. Lownsdale v. The City of Portland, and others.

be put to by the occupant were immaterial. He might cultivate or pasture it, or if he possessed a good site, and had the necessary thrift and enterprise, he might lay off and build up a town upon it. In the disposition of the public lands by Congress, this state of things called for peculiar legislation, differing altogether from that required for an unsettled country. Under these circumstances, can it be presumed that the Town Site Act of 1844—an obscure, special, and insignificant provision of then existing land system of the United States—was extended over this country, while the general system contained in the Pre-emption Act of 1841 was left behind? Nothing can be more unreasonable. It would tax the ingenuity of man to find a provision in the land system of the United States, as it stood in 1848, less applicable to the condition of Oregon, or that would have worked greater hardship, confusion and injustice than the Act of 1844.

To the thrifty and enterprising settler it would have said : By your management and industry you have built up a town on your land claimed and thereby lost it. If you had been content to live upon it in a seven-by-nine-cabin with tottering lean-to attached, and merely pastured it with a few Spanish cattle and cayuse ponies, it would have been yours.

The Acts organizing the territories of New Mexico, Kansas and Nebraska, extended the laws of the United States over them in the same language that the Act of 1848 did over Oregon, and yet they were not deemed to have extended the Act of 1844 over these territories. But Congress, by special enactment of July 22, 1854, extended it over them. If their organic acts extended the Act of 1844 over them, why this special legislation for that purpose? By Act of September 9, 1850, California was admitted into the Union. Section 3 of the Act declares “that all the laws of the United States *not locally inapplicable*, shall have the same force and effect within the State of California, as elsewhere in the United States.” This provision was never supposed to have extended the Act of 1844 or any portion

J. P. O. Lownsdale v. The City of Portland, and others.

of the land system of the United States, over that State; but on the contrary, Congress, by special Act of March 3, 1853, provided for the disposition of the unclaimed lands within that State, and extended the Act of 1844, by name over the lands therein, not mineral, and "*occupied by towns and villages.*" But I conceive that this question has been negatively determined by the Supreme Court in *Parrish v. Lownsdale et al.*, *supra*. In that case the Court says, that on July 29, 1850, when that suit was commenced, "Congress had passed no law in anywise affecting the title to lands in Oregon," nor did not "till September 27, 1850," referring to the passage of the Donation Act. The general expression includes the particular; and in this case the Court must have specially considered whether the particular Act of 1844 was in force or not, for the parties litigant before them were occupants of lots in the town of Portland, claiming some kind of an interest in or right to them. Yet the Court say, that *no* law had been passed by Congress in anywise affecting the title to lands in Oregon, before September 27, 1850; thus by the plainest implication negating the proposition that the Act of 1844 was extended to Oregon by the Act of 1848.

But the passage of the Donation Act itself is further evidence that Congress did not deem the Act of 1844 "applicable" to Oregon, and did not intend to extend it here. This act is a wide departure from the Act of 1841, commonly called the Pre-emption Act. It is a system complete in itself, and was admirably adapted to the condition of the people and the country as it found them. Substantially, it gave to every settler in the country his land claim as he held it, without any reservations or conditions as to lands fitted for the purposes of trade and commerce or town sites whatever. It assumes to be, as it really was, the first legislation by Congress affecting the public lands in Oregon. It was a practical and just recognition of the Land Law of the Provisional Government. The Donation Act is in this respect incompatible with the Act of 1844, and its passage puts the matter beyond cavil or doubt, that the Act of 1844 was not

J. P. O. Lownsdale v. The City of Portland, and others.

in force here until specially extended as above stated. In *Marlin v. T. Vault* (1 Or. 77), this question is well considered and the conclusion reached that the Act of 1844 was not extended to this country by the Act of 1848.

This exception must be allowed.

The fourth exception is taken to a portion of the answer called the fifth "count in equity." Said "count" alleges that in 1845 Pettigrove and Lovejoy selected the present site of Portland and caused a town to be laid out thereon; and that said P. and L. dedicated said levee to public use as far as was in their power. That the people of Portland accepted said dedication, and occupied said levee without let or hindrance up to the year 1849, when said P. and L. sold their claim to said town site to D. H. L. aforesaid; and that the said D. H. L. recognized said dedication, but when or how is not stated. That the people of Portland have always enjoyed the free use of said levee, except where private individuals have wrongfully occupied the same; and that D. H. L. did dedicate said levee to public use, and has never paid any taxes on the same. That D. H. L. claims to have acquired title to the premises since said dedication; and that complainant derived his title from D. H. L. long after said dedication.

The exception goes to so much of this so-called "count" as concerns the acts and doings of P. and L., and extends to the figures "1849." It must be allowed. The question is too plain for argument. P. and L. had no interest in the soil, never acquired any, and had nothing to dedicate. They simply held the naked possession of the land under the laws of the provisional government, according to the custom of the country, and when they gave up and abandoned this possession to D. H. L. he took it as though the foot of man had never been upon it, except as to the extent of its boundaries, or any liability he might take upon himself by special agreement with said P. and L. in relation to their past acts concerning it.

The remainder of this so-called "count" is also excepted to. It alleges a dedication upon the part of D. H. L., di-

J. P. O. Lownsdale v. The City of Portland, and others.

rectly, and also by recognizing the one said to have been made by P. and L. Now if D. H. L. made a dedication of the premises to public use, or recognized and confirmed one made by others, it is binding upon him, and also upon the complainant, his grantee, by reason of the priority of estate between them. What amounts to a dedication, and what does not, and whether any dedication made by D. H. L., before the passage of the Donation Act, will bind the after acquired estate, are questions that will properly arise and be determined on the final hearing.

This exception is disallowed.

The sixth exception is taken to so much of the answer as is denominated the sixth count in equity. This "count" alleges that on August 14, 1850, L., C. and C. aforesaid, released to the public certain lots in said levee, including the one in controversy; that the release was made upon certain conditions, one of which was, that the suit of *Parrish v. Lownsdale et al.* aforesaid, should be dismissed; and that the conditions upon which said release was made have been fulfilled, and the release accepted by the people. That the town has power by its charter, to remove obstructions from the levee, and that complainant derived his title from D. H. L. long after the making and acceptance of said release.

In support of this exception it is urged by the complainant that said release appears to have been made before the passage of the Donation Act—September 27, 1850—when D. H. L., nor any other, had no estate or interest in the land, and that being without covenants, it does not bind an after acquired estate in the premises; and that, if this were otherwise, the release never took effect, because the answer shows that the condition upon which it was given was never fulfilled—namely, the dismissal of the Parrish suit. Upon examination of the authorities, I find the cases upon the point, without exception, concurring in the rule, that a conveyance by deed of bargain and sale or release without covenant, does not bind an after acquired estate in the same land which as to the grantor, was then contingent.

J. P. O. Lownsdale v. The City of Portland, and others.

Where such after acquired estate is obtained by the grantor from any other source that the title which he assumes to bargain, sell or release, he is not estopped from claiming the premises, even against his own grantee. This release was made when D. H. L., had no interest in the soil. It passed nothing, supposing that it took effect, beyond the mere naked possession which he held under the laws of the provisional government. If he afterwards acquired the title to the premises from the United States under the Donation Act, it did not inure to the benefit of the public on account of said release. It may be, that where a party has the equitable estate or interest in lands and conveys the same by deed of bargain and sale or quitclaim and release, without warranty, and afterwards acquires the legal estate, that while he is not estopped by such deed from asserting said legal estate, equity will compel him to convey it to his grantee of the equitable estate.

Where there is a dedication to public uses, under similar circumstances, without deed, but by acts and declarations of the party having the equitable estate, the rule seems to be that the after acquired legal estate attaches to the dedication as soon as acquired by operation of law. But there can be no question upon authority that this release does not estop or bar the complainant from asserting his legal title to the premises, and upon the showing of the answer, it would be against equity and good conscience that it should. For while it is true that this portion of the answer avers that the conditions upon which the release was made were fulfilled, elsewhere the answer shows that this averment is not true. At the time the release was executed, it appears that the Parrish suit was pending. It involved the right of Parrish and the public to an easement in the strip of land since called the levee as against the alleged exclusive right of possession of L., C. and C. The terms of a compromise were agreed upon, by which the defendants, in that suit were to release a portion of the levee to the public—the latter at the same time relinquishing all claim to the remainder and to procure the dismissal of the pending suit. Yet it appears

The Pacific.

that the suit was not dismissed, but prosecuted to final decree in the Territorial Court against the defendants, which decree is now set up in the answer herein as an estoppel. Under the circumstances, to allow the defendants to claim anything under this release, would be in effect to sanction a fraud upon the releasors. This exception must be allowed.

The complainant has taken an exception to the separate answer of the Recorder, Orville Risley, and also to the like answer of the Marshall, James H. Lappeus. Neither of these exceptions are well taken. The matter excepted to may be impertinent, but being in response to his amended bill, the complainant cannot object to it on that ground.

Decree, that the first, second, third, fourth and sixth exceptions be allowed and that the remainder be disallowed.

George H. Williams and *W. W. Page*, for complainant.

George H. Cartter, for defendants.

DISTRICT COURT, JULY 17, 1861.

THE PACIFIC.

In a suit against a common carrier, the libellant makes a *prima facie* case, by producing the receipt of the carrier—"Received in good order;" but these words do not constitute an agreement; they are a mere admission, and may be explained or contradicted by the carrier.

In the National Courts the rule is, that a common carrier may limit his liability by an *express* agreement—so far as the common law makes him an insurer—but not for the negligence of himself or servants.

Nothing short of an *express* stipulation will constitute such an agreement; it must not depend upon implication, or inference, or conflicting or doubtful evidence; and mere notice to the shipper is not sufficient

Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship for the same, containing the words—"not accountable for contents;" this of itself does not constitute such an agreement; it is a mere *ex parte* proposition on the part of the carrier after the receipt of the package, to which there must be direct and unequivocal evidence of the assent of the shipper to exonerate the carrier.

The Pacific.

In a suit *in rem*, it is not necessary to charge the defendant as a common carrier, but the rule is otherwise where the suit is *in personam*; but in the former case it must appear from the evidence that the ship was employed in the business of a common carrier.

The burden of proof, to show the value of goods injured or not delivered, lies upon the shipper.

DEADY, J. The libel in this cause was filed April 22, 1861, and alleges that on or about January 25, 1861, the steamship Pacific—being about to depart from the port of San Francisco on a voyage to the port of Portland—received from the libellant, Moses Seller, in good order, one case containing two looking-glasses, of the value of \$450; and that the master of said ship, in consideration of certain freight and average to be paid by said libellant, agreed to convey said case and its contents to Portland, and there deliver the same to the libellant in good order. That the said master caused a receipt to be given to said libellant, whereby it was acknowledged that the said case and contents—marked “M. S., Portland, looking-glasses”—were received on board said ship “in good order.” That the said ship shortly afterwards departed on said voyage, and that by the negligence of said master, the mariners and servants under his charge, said looking-glasses were so damaged as to be wholly lost to the libellant, to his damage \$450.

The answer of the claimant, Samuel J. Hensley, filed April 27, alleges substantially, that upon information and belief he denies all the allegations of the libel *in the manner and form pleaded*, but admits the receipt of the case; and avers that the contents of the case were in bad order at the time of delivery, and that the officers of the ship observed it and refused to give the drayman who delivered the case at the wharf a receipt as for goods in good order, but gave him one containing the words “not accountable for contents.”

From the evidence it appears that a Mr. Adler, a short time before the sailing of the ship, purchased in San Francisco for the libellant two large fancy looking-glasses, about eight feet in length and three in width. That Adler sent

The Pacific.

the glasses to the house of R. A. Swain, a crockery and looking-glass dealer, to be packed for shipping, where they were packed in a redwood case in good condition, and in a manner well calculated to resist the ordinary incidents of a voyage to Portland. That from the house of Swain they were taken with ordinary care on a spring-dray to the wharf where the ship was loading, and that then the case was taken from the dray by the drayman—Frederick Beeson—with the assistance of the freight clerk of the ship—Philips—and placed on the wharf alongside the ship. Philips then gave the drayman a receipt in these words: “Received from A. Frank, *in good order*, on board steamer Pacific, for Portland, the following packages, marked ‘M. S., Portland,’ one case of looking-glasses, not accountable for contents.” The A. Frank spoken of in the receipt was the boss drayman, and Beeson was in his employ. At the time of giving the receipt, Philips said that he put the words “not accountable for contents” on it because the case *contained looking-glasses*, saying that was the customary way of receipting for such articles.

The case was in good order at the time of the delivery, and also the contents, so far as either the drayman or clerk observed; and there does not appear to have been even a suspicion by them to the contrary. The case laid upon the wharf about twenty-four hours, when it was stowed between decks. On January 27, the ship sailed for Portland, where she arrived after an ordinary voyage on Sunday morning following. The case was discharged upon Couch & Flander’s wharf, and upon turning it over, as it was being discharged, a rattling was heard inside, as of broken glass. On Monday morning Miller, the libellant’s drayman, went to the wharf to get the case, and as soon as he got there he heard from some one that the glasses were broken. The case was standing on end at the time, and the wharfinger, Flanders, was delivering freight for Philips, who was temporarily absent. Miller looked at the case, and observed that on one side, about eighteen inches from the end, there appeared to have been a sharp instrument, or thing like a

crow-bar, thrust through the boarding of the case, which splintered the board inwardly. Upon looking through the crack or hole in the board, he saw that the glass was broken—that the pieces were wedged-shaped—and that the cracks radiated from a common centre, as if the glass had been struck by some sharp-pointed instrument. Miller refused to receipt for the case in good order; whereupon Flanders proposed that it should be taken to the store of the libellant and examined in the presence of one of the ship's officers, and the damages ascertained. Thereupon the case was put upon the dray, when Poole, the purser of the ship, came up and said, *that* case should not go until the freight was paid. This was contrary to the usual custom of the ship with well known consignees in Portland, such as the libellant appears to be. The result was that the case was taken by Miller, under the direction of Flanders, to the warehouse of the wharfinger, where it still remains.

The board that had the hole made in it was brought into Court and exhibited. It came into two parts on being taken from the case. It appears to have been broken by a blow from the outside, and upon either side of the opening is a bruise about two inches in length, as if made by some hard substance pressing between the edges, and stained with that dark iron color which iron imparts to fresh wood when pressed hard against it. The glass is between $\frac{1}{4}$ and $\frac{3}{16}$ of an inch thick. No fragments of the ornaments have been observed among the pieces of glass in the case, and there is no evidence that any of the inside fastenings used to secure and keep the glasses in position, have given away.

The only witness whose testimony differs from this statement of the facts is Burns, the first mate. He testifies that he was present when the case was brought to the wharf in San Francisco, and that he assisted to remove it from the dray. That he heard a rattling among the contents at the time, and that the clerk gave the receipt with the words—"not accountable for contents"—by *his* direction, because the contents appeared not to be in good order. That

he superintended the stowing of the case, and that it was done carefully, but that every time it was moved on the voyage the contents rattled as if broken.

Philips and Beeson directly contradicted Burns as to what took place upon the delivery of the case at the ship. Both were interrogated upon this point directly, and both say in unqualified terms, that he was not present, and that Philips gave the qualified receipt not on account of the *condition* of the package or its contents, but because of their *kind and quality*. The receipt supports the statement of the clerk and drayman, and directly contradicts that of Burns. It does not state that the goods are damaged, but the opposite—that they are in good order.

Philips heard no rattling in the case until it was put on the wharf at Portland, when Burns called his attention to the fact. At the time of taking the case on board, Philips remembered that Burns called out to him and asked what was in it. Burns testifies that he then replied to Philips that there was something rattling in the case, but Philips testifies that he did not hear it.

The case was a large one, and seems to have been the only one of the kind shipped on that voyage. It is hardly credible that if Burns had assisted in taking the case off the dray and observed the words "looking-glasses" on it, and heard a rattling as if the contents were broken or loose and on that account dictated an unusual receipt against the remonstrance of the drayman, that he would on the next day when superintending the stowing of the case, with the case before him, call out the freight clerk on the wharf and ask him *what was in it*. The testimony of Burns must be disregarded as unworthy of credit on account of its improbability, and because it is directly contradicted by that of Philips, Beeson and the receipt.

The receipt and non-delivery of the package being admitted, the rule of law is, that the libellant makes a *prima facie* case upon proving the receipt of the carrier containing the words—"received in good order." It has been contended that the claimant cannot contradict this admission, but

the law is otherwise. The words in "good order" in a shipping receipt are, like the admission of any fact in any ordinary receipt for money, open to explanation or contradiction. They do not constitute an agreement, although they may be contained in one. But the burden of proof in this respect is upon the claimant; he must show the facts that the goods were *not* in good order, or he is bound by the admission in the receipt. This he has utterly failed to do, while on the contrary the libellant has satisfactorily shown, *aliunde* the receipt, that the package and contents were in good order when delivered to the ship.

But it is maintained for the claimant that the words on the receipt—"not liable for contents"—constitute a special agreement by which the carrier is exempted from all liability as an insurer, and only required to exercise that ordinary diligence and care which the law exacts from any ordinary bailee for hire.

The question of how far a common carrier can limit his common law liability, by special agreement with the shipper, has been thoroughly and ably argued by counsel. The authority of the Courts of New York has been relied on by counsel for the libellant, in support of the common law rule, that common carriers are insurers—that the law makes them so on grounds of public policy—and that any agreement which diminishes this liability is void as contrary to such policy, encouraging fraud and production of litigation. While I think that any innovation upon the common law rule on this subject, will always be the cause of more harm than good, yet this Court is bound by the authority of the *New Jersey S. N. Co. v. M. Bank*, (6 How. 344.)

In that case the Supreme Court held, that a common carrier might, by special argument with the shipper, limit his liability as an insurer, but not for the negligence of himself or servants. The Court also held that "the burden of proof lies on the carrier" to show such an agreement, and that nothing short of an *express* stipulation, by parol or writing, should be permitted to discharge him from the duties which the law annexed to his employment. The exemption from

these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties.

Tried by this rule, do the words in the receipt, taken in connection with the circumstances, constitute such an agreement? If they do, then, although the case was in good order when delivered to the ship, the burden of proof is upon the shipper to show that the injury resulted from the negligence of the carrier and not from unavoidable accident. Under such circumstances, the shipper takes all the risks except those which arise from or are incurred by the want of ordinary care and diligence on the part of the carrier.

No *mere notice* to the shipper of intention on the part of the carrier to limit his liability is sufficient to constitute such an agreement, or raise the presumption that the shipper acquiesced in or consented to the terms of such notice. The obligation and liability of an insurer—acts of God and the public enemy only excepted—are imposed upon the common carrier by law, and cannot be avoided by any expression of intention on his part so to do, without the express assent of the shipper to such intention. As the Court says in the case just quoted:—"If any implication is to be indulged in from the delivery of goods under the general notice"—that the carrier would not be responsible—"it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification." See, also, *Hollister v. Nowlen*, (19 Wend. 234.)

When Philips inserted in the receipt to the drayman the words, "not accountable for contents," the act amounted to nothing more than an *ex parte* proposition by the carrier after the receipt of the goods, and without the knowledge or assent of the shipper. The drayman Beeson was a mere bailee for hire, to take the package to the wharf and deliver it to those in charge of the ship and take a receipt for it. Such employment of *itself* gave him no authority to make any contract for the shipper or give his assent to any propo-

sition on the part of the carrier to limit his liability. Then, the evidence shows that the drayman informed the shipper of the terms of the receipt immediately, and because the latter did not reclaim the case, but allowed it to remain with the carrier, it is claimed that he assented to the proposition and is bound by it. But this would be to establish such an agreement "by implication and inference" when the "implication and inference" is just as strong that the shipper intended to insist upon his rights and the liability of the carrier.

Besides, the evidence also shows, that the shipper was not merely passive, but that he at once expressed his dissatisfaction to the drayman in strong terms, with the qualification in the receipt, and that the latter communicated this fact to the clerk soon after, and while the case was yet on the wharf.

As to the custom "not to sign for looking-glasses," unless the words "not responsible for contents" were inserted in the receipt, of which Philips testifies, as a matter-of-fact it appears to have depended, so far as it had any existence, upon the whim or caprice of the person receiving goods at the time. But if his were otherwise, it makes no difference. The law and not such a custom ascertains and limits the rights and liabilities of shippers and common carriers. Such *pretences* of custom as this appears to be, if allowed to be set up to control or modify the law on this subject would place it in the power of common carriers to make and unmake the law as they chose.

My conclusion is that the words in the receipt—"not accountable for contents"—were not assented to by the shipper, and therefore under the circumstances do not amount to an agreement to limit the common law liability of the carrier. This being so and it appearing that the articles were "received in good order" the burden of proof lies on the carrier to show that the injury resulted from either the act of God or the public enemy. Nothing of this kind is pretended. This view of the matter makes it unnecessary to determine, how, as a matter-of-fact, the

glasses were broken. It is probable that either by accident or wantonly some iron instrument, as a crow-bar, was thrust through the board produced in Court, and that it passed through the openings in the top-mounting of the frame of the glass next to that side of the case, without harming them, and then struck the *plate* of the other glass near to the base and broke it in fragments; and that this happened during the 24 hours that the case was lying on the ship's wharf at San Francisco. The glasses were packed in the case in a reversed position so that the lower end of each plate was over or under the scroll work which constituted the top of the frame of the other. The case has remained in the possession of the ship's agent, and if the claimant or he thought it would tend to establish the fact that the contents were not in good order when received, they might have had an examination made of the internal condition of the package.

Upon the argument, a point was made for the claimant that the libel did not charge that the ship was employed at the date of this voyage as a common carrier, and, therefore, it can only be held liable as a *private* carrier. Upon examination of the authorities and precedents within my reach, I find the practice to be, that when the suit is *in personam*, it is necessary to charge the defendant in the libel as a common carrier, or he will only be held to the liability of a private carrier (Story on Bail., § 504). But when the suit, as in this instance, is *in rem*, the rule seems not to apply, because, as I suppose, it would, to say the least, be inaccurate to charge an inanimate thing, as a ship, which is only a means of transportation as a common carrier. The suit proceeds against the ship as such, by reason of the peculiar jurisdiction of the Admiralty Court; but to hold her to the responsibility of a common carrier, it must appear in the proof that she was so employed at the time. No testimony appears to have been directly taken for this purpose, but enough appears incidentally in the evidence to establish the fact beyond a doubt.

The only remaining question is the amount of the damages. Without determining at what port the value of the goods *should* be estimated, I have concluded to take the testimony of Leopold Greenbury on this point. He is the only witness who speaks of the value of the glasses who saw them. He was the salesman in the house where the glasses were packed. Selling looking-glasses is his business, and in the market where these were shipped. All the rest of the evidence upon this point is the mere guess-work of persons without any special knowledge of the trade or these particular articles. The burden of proof is on the libellant to show the value of the goods. The carrier is not presumed to have any special knowledge or means of information on this subject. The libellant knows at what price he purchased the glasses, and there is no difficulty in proving it. The testimony of Adler, the libellant's agent in purchasing the glasses, might have been taken on this point. The omission on the part of the libellant to do this is calculated to make the impression that such evidence would not support his claim for damages *to the amount of* \$450. Greenbury swears that the glasses were worth \$150 at wholesale and \$200 at retail in San Francisco—owing somewhat to the customer. The mean between these two seems, with interest on that amount for six months at ten per centum per annum gives \$367 for both glasses.

Decree, that the libellant recover of the claimant and his sureties \$367 and his costs.

George H. Williams and E. Nugent, for libellant.

Erasmus D. Shattuck, for claimant.

The Panama.

DISTRICT COURT, SEPTEMBER 13, 1861.

THE PANAMA.

When a warrant to act as pilot appears upon its face to have been regularly issued, its validity cannot be questioned collaterally, or in a suit between third persons.

The possession and exhibition of the warrant authorize the master of a ship to treat the holder as a duly constituted pilot; and, as between third persons, is conclusive evidence that the conditions which the law attached to the appointment have been complied with.

Pilotage being "a rightful subject of legislation," the Territory of Washington has power to pass pilot laws.

The Act of August 7, 1789 (1 Stat. 54), is not a grant of power to the States to pass pilot laws, but a legislative recognition that the power is concurrent in the States and the United States until exercised by the latter.

Does the Act of March 2, 1837 (5 Stat. 153), include a territory? *Query.*

Whenever Congress exercises the power of passing laws on the subject of pilotage, so far the power becomes exclusive; and all prior laws of the States within the purview of such enactments are at once abrogated and cease to have effect.

The Act of August 30, 1852 (10 Stat. 75), provides for the employment of pilots on vessels propelled in whole or part by steam, engaged in carrying passengers on any of the bays, lakes, rivers, or other navigable waters of the United States.

This Act, so far as it goes, supersedes all State laws regulating the employment of pilots on this class of vessels.

In the construction of the Act of Congress of 1852, its operation is not to be restrained or limited because of the pre-existence of State laws regulating the employment of pilots under like circumstances.

There is no presumption that Congress did not intend to abrogate the State law; but, on the contrary, the power over the subject being paramountly in Congress, and only permitted to the States by suffrage, in case of conflict between the two the presumption is the other way.

DEADY, J. The libel of Charles Edwards, libellant, was filed March 27, 1861, and alleges that on March 17, 1861, and thereafter, the libellant was a duly licensed pilot, attached to the pilot boat "California," on the Columbia River bar, according to the laws of Oregon; and that on said date libellant boarded the steamship "Panama" "just outside" the bar, and offered his services as pilot to con-

The Panama.

duct said ship over said bar to the port of Astoria; that said ship was at the time of such offer bound in, and libellant was the only pilot authorized to pilot said ship on board of her on said day, and was the first pilot to offer his services to such ship on that day outside of said bar.

That on March 22, 1861, the said ship being bound outward over said bar, libellant hailed her at the port of Astoria and offered his services as pilot to conduct her across said bar to the sea; and that libellant was the first pilot who offered his services to said ship on said "occasion" and that there was no pilot on said ship "at the time."

That said ship when inward bound as aforesaid, drew 14 feet of water, and that libellant is entitled to \$12 per foot or full pilotage for this tender of services—in all, \$168; and that when outward bound, as aforesaid said ship drew 13 feet of water, and that libellant is entitled to \$6 per foot or half pilotage for this tender of services—in all \$78; and that said sums of money remain due and unpaid to the libellant.

On May 1, 1861, the claimants, Holladay and Flint, answered the libel admitting the facts stated, except, that the libellant "was duly authorized according to the laws of the State of Oregon and the United States to pilot seagoing steamships carrying passengers;" and that libellant was the first pilot who offered his services to said ship on said March 17 or 22, which allegations they deny.

The answer also avers that on March 17, when libellant boarded said ship, "Moses Rogers, a pilot duly authorized and licensed in accordance with statutes of the United States, to pilot steamboats carrying passengers on the waters of the Columbia Bar, Coast and Puget Sound, and to San Francisco, California, was on board the said ship and had charge and control of her as pilot;" and that said Rogers piloted said ship on said occasion from the high sea over said bar to the port of Astoria. That on March 22, aforesaid, said Rogers was the first qualified pilot who offered his services to the master of said ship, and did on

The Panama.

said date pilot said ship across said bar to the open sea. That said Panama is a sea-going steamship, propelled in whole or part by steam, and on March 17 and 22, aforesaid was engaged in making a voyage from San Francisco to Portland, carrying freight and passengers.

That on the date last aforesaid, said "Rogers was a duly licensed bar pilot according to the laws of the Territory of Washington" regulating "pilotage on the Columbia River Bar and shoalwater bay, passed February 28, 1854."

On July 1, libellant filed an amended libel admitting that on March 17 said Rogers, "a person pretending to be a duly authorized pilot was on board said ship," and piloted her across the bar to Astoria, but avers that libellant offered his services before said Rogers did; also admitting the same as to the voyage out on March 22, but avers that libellant "hailed said ship first and offered his services as a pilot;" and that said Rogers pretends to be an authorized pilot by virtue of a license from one Pitfield, "a person pretending to be a supervising inspector of the fourth district of the United States," and that "if said license is genuine" it does not authorize said Rogers to pilot steamships over the Columbia Bar; also admitting that Rogers received a license from the pilot commissioners of the Territory of Washington under the Act of 1854, as alleged, but avers that Rogers never performed the conditions imposed by said Act, and therefore said license never took effect, and that said Act has long since been repealed, and that all licenses issued under it became void on such repeal; also admitting that the Panama is a sea-going vessel, propelled in whole or in part by steam, and was engaged in carrying freight and passengers between San Francisco and Portland, as alleged.

From the evidence it appears that the libellant was appointed a pilot on Columbia River Bar under the Oregon Act of October 17, 1860, by a warrant from the "Board of Pilot Commissioners," bearing date, January 22, 1861; and that Rogers was appointed such pilot under the Terri-

The Panama.

tory of Washington, Act of 1854, by a warrant from the "Board of Pilot Commissioners" bearing date January 13, 1860.

In the argument for libellant it is contended, that this warrant to Rogers is without legal effect, because it does not appear that he gave bond and kept a suitable boat on the bar as required by the act. But Rogers is not a party to this suit, and the ship is not liable for any want of authority on his part which was not apparent to the world. The exhibition of his warrant or commission, regular upon its face, entitled him to be treated and authorized the ship to receive him as a pilot. By the Act of the Territory of Washington a pilot "is authorized to take charge of any vessel requiring his services, but shall first show the master his warrant." Upon the production of the warrant the master had a right to presume that the conditions of Rogers' appointment—if any—had been complied with to the satisfaction of the Commissioners who, by the Act, have complete control of the subject of the appointment, suspension and removal of pilots.

It is true that the Act of 1854 requires a pilot, before entering upon the duties of his office to give bond to the Commissioners," but it does not require or allow that *he* shall keep the bond to exhibit to masters of vessels or that it shall appear upon the face of the warrant that the bond has been given. The Act does not expressly say that the bond shall be given before or at the time the warrant issues, but such is the reasonable construction, and it is fair to presume that the Commissioners to whom the bond is to be given would require it to be done at or before the delivery of the warrant.

As to the alleged repeal of the Act of 1854, the fact appears to be that on January 31, 1861, section 4 of said Act was repealed and another enacted in lieu thereof, requiring each pilot to keep a boat on the bar "of not less than fifty tons burden," while the section repealed only required the pilot to keep such boat "as the Commissioners might approve." This was no repeal of the Act as such,

The Panama.

and in no way makes the warrant before issued to Rogers "*void and of no effect.*" It only imposed a fixed rule in relation to the kind of boat the pilot should keep on the bar instead of leaving it to the discretion of the Commissioners as before.

It is further insisted on the part of the libellant that a territory has no authority to pass pilot laws and that therefore the warrant to Rogers is invalid. The argument is grounded upon the assumption that the Act of August 7, 1789 (1 Stat. 54), *grants* the power to the *States* to pass pilot laws and that a territory is not included in the word *States*, and therefore it has no power to legislate on the subject. Admitting the premises for the sake of the argument, the conclusion does not follow. The power to govern the territories subject to the constitution is in Congress irrespective of the powers which it may exercise within the limits of a State. This power may be exercised mediately or immediately, by the creation of a Territorial Government therein, with power to legislate for the Territory, or by the passage of laws directly by Congress, without the intervention of the Territorial Government. The Act of Congress (10 Stat. 172), organizing a Government for the Territory of Washington, declares that the "legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." A *rightful subject* of legislation is a subject, which from the nature of things, the course of experience, the practice and genius of our Government properly belongs to the legislation to regulate and control rather than the judicial or executive departments of the Government. Pilots and pilotage are as much the proper subjects of legislation as any subject ever regulated by the law of a Territory, and have been so from their earliest history. Congress has power to legislate upon this subject in the Territories. Being "a rightful subject of legislation," in this case Congress has given this power to the Territorial legislation.

Neither was the Act of 1789 a grant of power from Congress to the States to legislate on the subject of pilots and

The Panama.

pilotage. The power is concurrent in the State and National Government until exercised by the latter, when so far as exercised it becomes exclusive. If the power was exclusively in the National Government, *Congress could not grant it to the States*, and being concurrent it could not nor need not. This view is in substantial accordance with the doctrine of *Cooley v. The Board of Wardens* (12 How. 316), that the Act of 1789 is a new legislative recognition of the concurrent power of the States over this subject, so long as Congress does not act in the matter.

The warrant to Rogers is further objected to because it is headed "temporary." The word is superfluous, because if it has any legal effect, it is the same that the law would give the warrant without it, namely, that the party was to hold the place during the pleasure of the Commissioners. So far as appears the warrant has never been revoked. For these reasons I conclude that the Territorial Act of 1854 is a valid act, and that Rogers was a duly qualified pilot thereunder on the Columbia Bar, on March 17, 1861, when the libellant boarded the Panama on her inward bound voyage.

By the Act of Oregon, the *first* pilot that offers his services outside of the bar, to a vessel bound inward, is entitled to full pilotage, whether his services are accepted or not, and to one bound outward under like circumstances, half pilotage. Under this provision the question is made by counsel whether libellant or Rogers *first* offered his services to the ship on March 17th, on the inward bound voyage? It is substantially admitted by the pleadings that the libellant was the first pilot that in fact boarded the Panama outside the Bar, and the evidence proves satisfactorily that Rogers was on board at the time, hired by the month, to serve as pilot between the port of San Francisco and Portland, and that he piloted the ship in over the Bar on the occasion in question. Under these circumstances is Rogers to be considered a Bar pilot who tendered his services as such to the ship before the libellant? The principal objection to his being so considered is that he was not on the Bar at the time

The Panama.

of the offer, and did not maintain a pilot boat there. I do not think the objection sufficient. The libellant, for anything that appears, might have gone half way down the coast to meet the Panama, and if the master was willing to take him on then, and bring him up to the bar as a pilot, it would be a good offer of his services so as to prevent another pilot who remained on the bar from *first* offering his services.

Nor do I think the Court can in this suit consider whether Rogers kept a boat on the bar at the time to cruise for vessels or not. As to third person, so long as his warrant is unrevoked, I think he must be considered a qualified bar pilot. If Rogers was libellant in a suit, claiming compensation as pilot, it might possibly be shown in bar of such claim that he did not remain on the bar and cruise for vessels with a sufficient boat, etc. But even this is doubtful. The Legislature has confided the administration of the law in these matters to the Pilot Commissioners. Whenever it appears that a pilot is evading the law and using his authority to the detriment of commerce or the pilot service, they can and should revoke his warrant.

The conclusion reached upon this point renders it unnecessary to consider whether the Act of 1837 (5 Stat. 153) applies to this case. By that act, the master of a vessel upon waters that form the common boundary between two *States* is authorized to take a pilot from either; and therefore is not required to take the *first* pilot that offers, but may take the second one from the other State. Whether the word *State*, as used in this Act should be construed so as to include a territory, is a question not free from doubt. The case is within the *mischief* intended to be remedied by the Act, and it seems to me might be held to come within its spirit and purview, without any violation of principle. I do not think it comes within the reasoning or considerations that controlled the Court in *Hepburn et al. v. Ellzey* (2 Cranch, 445), in which it was held that under the Judiciary Act giving the National Courts jurisdiction of controversies between citi-

The Panama.

zens of different *States*, that a citizen of the District of Columbia could not sue in such Courts, as a citizen of a State, because such district was not a member of the Union. But waiving this point, the libellant not being the first pilot to offer his services as alleged in his libel, on the inward bound voyage, cannot recover on that claim.

Upon the claim for half pilotage, I find from the evidence that on March 22, between upper and lower Astoria, and below the custom house, as the Panama was proceeding to sea, the libellant rowed out into the stream, hailed the ship, and offered his services as a pilot; and that the master of the Panama paid no attention to the offer, but steamed down the stream some three or four hundred yards, opposite the wharf at lower Astoria. At this point the ship was stopped, and Rogers, who appears to have been waiting for her, went on board *immediately* and piloted her out to sea; and that this all occurred on what is understood among navigators who frequent that harbor as pilot-ground. It does not appear that the limits of the pilot-ground have ever been authoritatively defined, and are only known from local usage.

As a conclusion of fact from the foregoing, I find that the libellant first offered his services to the ship on this occasion, and assuming that the Act of 1837 does not apply to a water which is the boundary between a State and a *Territory*, the libellant, as against a territory of Washington pilot, was entitled by reason of such offer to be employed or paid his claim for half pilotage.

But it also appears from the evidence and the admission of the pleadings, that Rogers, on March 22, was a duly licensed steamboat pilot, under the Act of 1852. It is admitted by the pleadings that the Panama is and was a vessel propelled by steam and engaged in carrying passengers. This brings her within the class of vessels provided for in the Act of 1852, and the Acts of 1838 and 1843, of which it is amendatory, and commonly called the Steamboat Acts. The avowed purpose of these Acts is, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." As a

The Panama.

means to this end, the Act of 1852 (10 Stat. 75) provides that "instead of the *present system of pilotage of such vessels*, and the present mode of employing engineers on the same," there shall be a board of inspectors in each collection district who shall examine, "license and classify *all engineers and pilots of steamers carrying passengers*;" and that "it shall be unlawful for any person to *employ*, or any person to *serve*, as engineer or pilot on any such vessel *who is not licensed by the inspectors*; and any one so offending shall forfeit one hundred dollars for each offence."

It is also admitted that the libellant was not a duly licensed pilot under the Act of Congress of 1852.

But it is maintained on his behalf that Congress did not intend by the passage of this Act to supersede the existing State laws on the subject of pilotage, because it is said the Act does not expressly so declare—because of the inconvenience that would result from such construction, and because it being eminently proper and necessary that the States should control this subject themselves, it is therefore not to be supposed that Congress would interfere with it.

As to the power of Congress in the premises there can be no doubt. The constitution (Art. I, § 8,) gives Congress power "to regulate commerce with foreign nations and among the several States." This includes the power to regulate navigation, and pilot laws are regulations of navigation. In *Cooley v. The Board of Wardens* (12 How. 315), the Supreme Court say: "That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relation which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualification of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the

The Panama.

penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution."

The power of Congress being established, what was the intention in this respect in the passage of the Act of 1852? In its language nothing can be found limiting its operation *as to place*. It expressly applies to pilots on all vessels propelled by steam and carrying passengers upon "the bays, lakes, rivers and other waters of the United States." As to the argument founded upon the assumed inconvenience and impropriety of superseding the State pilot laws I do not assent to the assumption nor perceive the force of the argument drawn from it. The question of convenience and propriety is for Congress to determine. The frequent and almost wanton loss of life and property under the former system of piloting steam vessels and employing engineers thereon, and the inability of the separate States to remedy the evil, was a sufficient reason, if any reason beside its own will was necessary, for the action of Congress. Nor are the Acts of Congress to be limited in their legal import or restrained in their operation, upon the idea that some State law is thereby rendered inoperative, or that some State prefers some other system or regulation. The Act of Congress on this subject is paramount, and all State legislation which is inconsistent or in conflict with its terms, reasonably and fairly construed, must give way. Nor is it true that there is any presumption in favor of the State law and against the Act of Congress, which in a doubtful case would determine the question in favor of the former. On the contrary, when, as in this case, the power over the subject is paramountly in Congress and only permitted to the State by the sufferance of the former, the presumption, if any, would be the other way. The wisdom and necessity of the Act were questions for Congress to determine, and not the Court or State. There is, then, no reason why the terms of the Act should not be taken in their natural and ordinary import, so that, when it declares that the regulations therein pre-

The Panama.

scribed, shall be substituted for the present *system of pilotage of steam vessels*, it shall be held and construed to mean what it says. At the date of this Act what was the *existing system* which these regulations were to take the place of? Certainly, it was the laws and usages of the States and ports therein, regulating and governing the subject of pilots and pilotage of steam vessels. The regulations of the Act were to be *instead of*—to take the place of this system of the States. Wherever *this system* existed, in this respect it was to be *changed and superseded* by the establishment of these regulations. Is the Columbia river bar in any way exempt from the operation of these general words? It is a water of the United States, and at the date of the Act there was a State system of pilotage for steam vessels upon it. As the State system did not extend beyond the waters and ports within its limits, there can be no ground for presuming or assuming that the proposed change was intended to be confined to the high seas—as in such case the act would work no change at all. Because the State has a system of pilotage upon the Columbia bar with which these “regulations” interfere, so far as steam vessels are concerned, is the substantial reason urged why the bar should be considered as not within the provision of the Act. If this had been the intention of Congress in passing the Act, instead of declaring, as it did, that the regulations therein should take the place of the then existing system, it would have read somewhat in this wise: “The following regulations shall be observed *instead of the present system* of pilotage for steam vessels—that is the State pilot laws and usages—*only where the present system does not exist.*”

I am satisfied that the Act applies to the employment of pilots on steam vessels engaged in carrying passengers, throughout the whole voyage and every part of it. It is made a crime for the master of any such vessel to employ any one as a pilot unless first licensed by the United States Inspectors, or for any one not having such license to be so employed. For the greater security of life, it seems to have been the intention of Congress to no longer leave this sub-

The Panama.

ject to the conflicting and inefficient legislation of the several States, or the total lack of it, but to provide a general rule and uniform authority for examining and licensing pilots for steam vessels; men who were not merely acquainted with the channels, rocks and shoals of a particular water or route, but also with the machinery, action and motive power of steam vessels, and who were competent to control and handle them under any or all emergencies. A bar pilot under the State system may be a good seaman and familiar with the currents, tides and shoals of his pilot-ground, but this alone is not sufficient to qualify him to take charge of a steam vessel.

The difficulty suggested by counsel, that pilots licensed by the United States Inspectors would be wanting in local knowledge is possible, but not very probable. The inspectors are to inquire diligently into the qualifications of the applicant, and for this purpose may examine witnesses. One of the necessary qualifications of a pilot for any vessel is a knowledge of the particular pilot-ground for which he is licensed. The inspectors are appointed within collection districts, and their licenses are for routes within such district. They may, with good reason, be supposed to have as much knowledge and means of information in the premises as a board of pilot commissioners appointed by the State. As yet no inspectors have been provided for this district, and the administration of the Act in this respect has devolved upon the supervising inspector living upon the Atlantic coast. Under this state of things, it is not to be expected that the examination of pilots and engineers would be very thorough or frequent, and such I understand has been the fact. But as soon as the importance of the matter is brought to the attention of Congress, inspectors will doubtless be provided for this district, and this difficulty will be obviated. The Act only so far abrogates the State system as to require that a steam vessel, carrying passengers, shall be under charge of a pilot licensed by its authority. The compensation of pilots, the manner and times

J. P. O. Lownsdale v. The City of Portland, and others.

of offering their services, still remain, until Congress sees proper to provide otherwise, legitimate subjects of State legislation.

The libellant, although he first offered his services to the Panama, as she was outward bound, is not entitled to recover his claim for half-pilotage. The law of the State under which he claims, as to the necessary qualifications for piloting the Panama, was abrogated by the Act of Congress. The libellant was prohibited under a penalty of one hundred dollars from being employed on her as a pilot and the master in the like sum from employing him.

Decree, that the libel be dismissed, and that the claimants recover of the libellant and his sureties their costs.

George H. Cartter, for libellant.

David Logan, for claimants.

DISTRICT OF OREGON, DECEMBER 6, 1861.

J. P. O. LOWNSDALE v. THE CITY OF PORTLAND, GEORGE C. ROBBINS, JACOB DAVIDSON, A. D. SHELBY, JACOB STITZEL, WILLIAM S. HIGGINS, J. C. AINSWORTH, M. M. LUCAS, ERASMUS D. SHATTUCK, ABSALOM B. HALLOCK, ORVILLE RISLEY AND JAMES H. LAPPEUS.

A dedication of land in Oregon to public use by an occupant thereof, prior to September 27, 1850, does not bind or estop a subsequent occupant of the same lands.

The exhibition or publication of a map or plan of a town by the proprietor thereof, upon which certain spaces are marked as streets and public squares, is evidence of a dedication of such spaces to public use as streets and squares.

When a dedication of ground to public uses is attempted to be established by proof of casual conversations and remarks by the owner, susceptible of various meanings and constructions, such proof should be closely scrutinized, and, unless in harmony with the established circumstances of the case, but little heeded.

J. P. O. Lownsdale v. The City of Portland, and others.

As against the general owner, a dedication of land to public use is not to be presumed, but must be proved; and when the evidence consists of the parol acts and declarations of such owner, they ought to be of such public and deliberate character as to be generally known and not of doubtful import.

The adoption, by the Common Council of Portland, of a map upon which Front street is represented as being bounded by two parallel lines, so as not to include a strip of land lying between it and the Wallamet river on the east, is a solemn admission by the corporation of Portland that said strip of land is not a part of Front street.

A release without covenants by a party in possession does not affect an after-acquired estate in the same lands by the releasor.

DEADY, J. This suit was commenced November 9, 1860, to enjoin the defendants from trespassing upon lots 1, 2 and 3 in block 74 of the town of Portland, and to quiet the title of complainant thereto. On June 8, it was heard upon exceptions for impertinence to the amended answer. On December 5, it was finally heard upon the amended bill, answer thereto and proofs, and submitted on written arguments afterwards filed, and taken under advisement.

By his amended bill the complainant alleges that he is a citizen of Indiana; that he is the legal owner and entitled to the exclusive possession of lots 1, 2 and 3 in block 74 in the town of Portland, and has been seized in fee of the same and had the possession thereof since about January 1, 1853; that in pursuance of a long-contemplated purpose, about July 1, 1859, he caused piles to be driven and the framework for wharves to be erected on said lots, and that said improvements are of the value of about \$1,000; that said improvements were made without objection or hindrance on the part of the defendants, but that the defendants have since threatened to remove, tear down and destroy the same, and have arrested the agents and employes of complainant engaged on said improvements, and now hold them in custody without authority of law; that the defendants falsely and wrongfully allege that the town of Portland has some right or title in and to said lots adverse to the complainant, and by reason thereof defendants make said threats and will execute them unless restrained, but that said town has no right or interest in such lots either at law or in equity;

J. P. O. Lownsdale v. The City of Portland, and others.

that said lots are worth about \$12,000, but if the defendants be permitted to execute said threats, they will be valueless to complainant, and the complainant will suffer great and irreparable damage; and that by reason of the false and wrongful representations aforesaid, many persons suspect that complainant's title is invalid, with a prayer for a perpetual injunction.

The separate amended answer of the town of Portland denies the material allegations of the amended bill, and then pleads by way of answer that in the year 1845, the present site of Portland was laid off in blocks, lots, streets, squares, and a levee, by Francis W. Pettigrove and Abbot L. Lovejoy, and that said streets, squares and levee, were dedicated to the use of the public by said P. and L. forever; that the people of Portland accepted such dedication, and occupied and possessed the same up to the year 1849, when the said P. and L. transferred all their right to the land claim upon which the town was laid out to Daniel H. Lownsdale, and that said D. H. L. recognized and affirmed said dedication, and did particularly represent and state that the strip of land now called the levee and then Water street, was public property, and by reason of such representations did sell lots adjoining thereto at enhanced prices; and that the people of Portland have always had the use of the same except where wrongfully deprived of it by private claimants, and that D. H. L. has never paid any taxes on said lots; that the premises in controversy are within said dedication, and D. H. L. claims to have acquired title to the same since such dedication, and that the complainant claims through said D. H. L., and is therefore barred from asserting any interest in the premises as against this defendant. And for further answer, that the town is authorized by its charter to prevent and remove nuisances and obstructions from the streets and the Wallamet river within its limits, and that the Common Council thereof on August 2, 1860, passed an ordinance to prevent and remove obstructions from the Wallamet river and the levee thereon, between Washington and Main streets.

J. P. O. Lownsdale v. The City of Portland, and others.

The defendant, Orville Risley, by his separate answer says that by virtue of his office of Recorder, and the ordinance of August 2, 1860, he issued a warrant for the arrest of the agents and employès of the complainant engaged in erecting improvements on the lots in question.

The defendant, James H. Lappeus, by his separate answer says that by virtue of his office of Marshal and the warrant aforesaid he arrested the agents and employès aforesaid.

From the pleadings and proofs certain facts appear to be established in this case, which it will be well to state in their chronological order, before proceeding to investigate those that are controverted and about which doubts may exist.

Sometime in 1845 Pettigrove and Lovejoy took up the land claim of 640 acres upon which the town of Portland is now built and occupied it until September 22, 1848, under the land law of the provisional government, the title thereto being in the United States, during which time they laid out some portion of it in blocks, lots and streets, and that on said September 22 they abandoned or transferred their possession to Daniel H. Lownsdale, and that sometime in the year 1849, Stephen Coffin and W. W. Chapman became joint occupants and interested in the possession of the land claim with D. H. L. That afterwards said D. H. L., under the Donation Act of September 27, 1850 (9 Stat. 497), became a settler upon one third of such land claim, including the premises in controversy, and by virtue of the required four years residence and cultivation, as evidenced by the donation certificate, became the legal owner thereof, and on September 20, 1851, by deed duly executed, conveyed said lot 3, and on January 1, 1853, said lots 1 and 2, to complainant; that on April 29, 1852, the Common Council of Portland, by resolution, adopted the plat of the town "drawn by John Brady as the city plot," and that said Council, by ordinance, passed August 2, 1860, asserted the strip of land east of Front street to be a public levee, and provided for removing all obstructions therefrom, which ordinance was by said Council repealed on June 14, 1861, and on August 6,

J. P. O. Lownsdale v. The City of Portland, and others.

1861, said Council passed an ordinance declaring said strip of land to be private property, and permitted the holders thereof to build wharves, wharf-houses and docks thereon; that in the years 1854 and 1858 the town of Portland assessed the premises for the purpose of taxation, and that said taxes were paid to the town by D. H. L. for complainant; and that D. H. L., on April 20, 1851, and for six successive weeks thereafter, published a notice in the weekly *Oregonian*, a paper of general circulation in the town of Portland, that he claimed the land east of Frontstreet, including the premises in controversy, and warned all persons from trespassing thereon.

Both parties admit the title of D. H. L. The complainant claims under him by a paper title which has been satisfactorily proved. He is also shown to have been in the actual possession of the premises at the commencement of this suit and as far back as July of the same year. Whether the premises were actually occupied by him before that time does not distinctly appear; but the title draws to it the possession and he would be presumed to have it, if material to his rights, unless the contrary were shown. The defendant also claims under D. H. L. by dedication to public use. The defendant alleges that this dedication was originally made by P. and L., but this allegation is not supported by any evidence whatever. On the contrary the evidence tends to show that P. and L. held and occupied the property now called the levee as private property. They had upon it a private wharf and slaughter-house, and used them as such.

But if the fact were otherwise, and it appeared beyond doubt that P. and L. did make such dedication, it would be immaterial. They had nothing in the land to dedicate. They were mere occupants of the public land; had only the naked possession, which terminated with such occupancy, and could not by any act of theirs charge the lands in the hands of any subsequent occupant with any easement or encumbrance whatever. This question was fully considered and discussed when this case was before the Court on exceptions for impertinence.*

* *Lownsdale v. The City of Portland et al.*, ante, 1.

J. P. O. Lownsdale v. The City of Portland, and others.

It is also alleged that D. H. L., after he came into the possession of the land claim, ratified and confirmed such dedication by general representations to the public, as well as particular ones made to persons to whom he sold lots lying contiguous to said levee. Neither is this allegation supported by any evidence whatever. And from the fact that no such general or special representations have been proven, although if made the fact must be known to many persons now living here, I conclude that the allegation is absolutely untrue as well as unproved.

This disposes of the question of dedication so far as it distinctly appears upon the pleadings; but on the trial evidence was offered to show a special and original dedication by D. H. L., jointly with Coffin and Chapman after they had been admitted into the possession of the land claim with him. In considering this evidence, it is well to bear in mind that D. H. L. was the owner of this property, and that the burden of proof is upon the town to show such dedication. It should be clear and cogent, and when it consists of casual and disjointed conversations and remarks, often indifferent in themselves and susceptible of various interpretations and colorings, owing to the prepossessions and prejudices of the witnesses who detail them, it should be closely scrutinized, and unless in harmony with the established circumstances of the case, but little heeded. Security and certainty of title to real property are among the most important objects of the law in any civilized community. Any act intended and permitted to affect the ownership or use of such property the law requires to be done or suffered with certain solemnities and formalities, so that the fact may be read and known of all men. What is shown to have once belonged to a person he is not *presumed* to have parted with; but the fact, if claimed, must be satisfactorily proved. And, although from the nature of the case, a dedication of streets and public grounds in towns may be shown by acts and declarations in parol, they ought to be of such a public and deliberate character as would make them generally known, and not of doubtful import. Of this charac-

J. P. O. Lownsdale v. The City of Portland, and others.

ter are the exhibition or publishing of a map of a town, with certain spaces marked thereon as streets or public squares.

But it is too apparent to admit of doubt that the introduction of this evidence was an indirect attempt on the part of defendant to avail itself of the release which was held to be invalid and insufficient for this purpose on the exceptions to the amended answer for impertinence. The only witnesses who speak of this alleged dedication, are W. W. Chapman and Shubrick Norris, and they both state that it occurred in the summer of 1850, and that it was the controversy which resulted in this release.

Now, the nature of that transaction seems to have been this: From the time of his occupation of the claim to July, 1850, D. H. L. appears to have been in the undisputed possession of the strip of land now called the levee, east of Water, now called Front, street, as much so at least as of any other undisposed part of it. Up to this time no one has been found who ever heard even of any dedication of this land to the public by any one, let alone D. H. L. In the fall of 1848 he is shown to have kept a private wharf upon it, for hire. The person who attended the wharf testifies to the fact. The wharf was afterward accidentally carried off by the river. In April, 1850, D. H. L. had the town surveyed by R. V. Short, who then laid off this strip of land into fractional blocks and lots, which were openly sold to the public. By this survey, Front street, instead of extending to the Wallamet river, was bounded on the east by a line parallel with the west side of it, making a street of the usual width of other streets in the town, and continuing the streets that crossed it at right angles to the water. After all this, in July, 1850, while a building was going up in one of these fractional blocks east of Front street, Parrish, the occupant of a lot on the opposite side of the street, commenced a suit to enjoin the erection of the building. At this time D. H. L. was in San Francisco. He came home soon after, and, on hearing of the matter, said to Chapman, who had acted as his agent in his absence, that he had not intended

J. P. O. Lownsdale v. The City of Portland, and others.

to have that piece of ground *built* upon, but intended it for wharves. Apart from the written release, this is the only word of D. H. L.'s, one way or the other, that the defendant has shown upon the subject of this alleged dedication.

Does it amount to a dedication, or imply that one had been made? Certainly not, even when considered apart from the strong qualifying circumstances; but when taken in connection with his continued and open acts of ownership and occupation before or since, it would be preposterous to draw any such inference from this single expression. The declaration is one which might very naturally and properly be made by a town proprietor, upon finding that his agent, in his absence, had authorized or permitted an ordinary building to be erected on a block which he had reserved or set apart to build a wharf upon. The words plainly imply a private ownership on the part of D. H. L. inconsistent with an existing public use, and a purpose to have used it in the future as a private wharf-ground for his own benefit. However, in the language of witness Chapman, for the purpose of "buying peace" and getting rid of the suit which would disparage and prevent the settlement and growth of the new town—then struggling for recognition as a place of promise and future importance—a compromise was arranged by which L. C. and C. agreed to release to the public that portion of said strip of land lying between Main and Washington streets, which includes block 74, on condition that said suit should be dismissed. This condition was never performed, and the release never took effect.

Doubtless, from thence until the fall term of the Court in which the suit was pending and to be dismissed, the understanding of all parties was that according to and in pursuance of the terms of this compromise, the above mentioned portion of said strip of land was to be left open to public use as a levee or landing. This period was about one month. But the suit was not dismissed. It was kept hanging over the town and retarding its growth to the special injury of the releasors. Whatever the cause for this failure to perform the condition in the release, it was no

J. P. O. Lownsdale v. The City of Portland, and others.

fault of the releasor, D. H. L., and the public took nothing by the transaction.

I have been induced to state the particulars of this transaction, which is here sought to be distorted into an absolute dedication, by keeping out of sight the release itself, while showing the general impression of the public and the casual conduct of the releasors after it was executed and before it was known that its conditions would not be complied with, more for the purpose of showing that the claim of the defendant is without any merit, than for the purpose of determining its legal effect.

Upon the exceptions for impertinence in this case the Court held that if the release had been unconditional, being a mere quitclaim without covenant from a mere occupant having no title, it would not bar the releasor from asserting the after acquired title from the United States.* The rule of law upon this question is established beyond doubt. The authorities go in one unbroken current to the effect stated.

But not only has the defendant failed to prove a dedication to public use, but upon the whole evidence, it satisfactorily appears, that there never was any such dedication or intention to make it, apart from the proceedings connected with the giving of the release. The map drawn by John Brady from the survey of Short, is in evidence. The latter recognizes it and testifies that it was made from his survey. The map is without date, but it is proven that the Short survey was made in the spring of 1850, and Short also testifies that he saw the Brady map in Portland in the fall of that year. From the inspection of that map it plainly appears that Front street is bounded by two parallel lines, and that the strip of land between the east line of said street and the Wallamet river is laid off in blocks and lots varying in depth with the meanderings of the river. Nothing appearing to the contrary, this fact alone is sufficient to decide the question against the defendant. Nor is this all; the defendant, on April 29, 1852, by a resolution of its Common Council, deliberately recognized and adopted this

* *Lownsdale v. The City of Portland et al.*, ante, 1.

J. P. O. Lownsdale v. The City of Portland, and others.

map as a correct representation of the plat of the streets and blocks and lots delineated thereon. In the year 1854 the corporate authorities assessed the premises in controversy as private property and collected the tax in 1855. The same thing was done in 1858. D. H. L. always claimed this so-called levee as private property and constantly asserted his right to it, by notice to the public, by sales of portions of it, by actual occupation from time to time, and by payment of taxes levied thereon by defendant. Even since the commencement of this suit the defendant has, by two different ordinances passed by its Common Council, deliberately admitted that the levee was private property. (*Ordinances of June 14 and August 6, 1861*).

The complainant is shown to be the legal owner of the premises, and it does not appear that they were ever dedicated to public use by the grantor of the complainant, or any one else. The defendant did, and was threatening and proceeding to continue to commit the trespasses complained under a claim of right or use in the premises.

Decree, that the town of Portland, and the corporate authorities thereof, of whatever name or nature, be perpetually enjoined from asserting any right, title, or interest in said premises, or in any way trespassing upon or molesting the complainant in the occupation and use thereof by reason of the supposed dedication in its answer alleged and set up, and for costs.

George H. Williams, W. W. Page, and A. C. Gibbs, for complainant.

George Cartter and John H. Mitchel, for defendant.

The Christina.

DISTRICT OF OREGON, FEBRUARY 8, 1862.

THE CHRISTINA.

In a suit for seaman's wages the maxim that "freight is the mother of wages" does not apply to a voyage commenced and intended to be made in ballast, for in such case it was not expected that freight would or could be earned.

A contract to ship as seaman on a trading voyage on the coast, without any definite stipulation as to the time or place of termination of the voyage, when justice to the seaman requires it, will be held void.

A contract entered into between master and seaman, *at sea*, changing the terms or duration of the original contract, should be closely scrutinized, and if prejudicial to the seaman's interest, disregarded.

DEADY, J. This is a suit by David Waling for seaman's wages. The libel alleges that the libellant shipped, without signing articles, on the sloop Christina, at Port Townsend, W. T., on October 28, 1861, on a voyage *via* Bellingham bay to Portland and back, upon the agreement that at Portland the master would purchase a cargo of apples and carry them to Port Townsend, and give the libellant one third of the profits as his wages; that the sloop proceeded to Portland *via* Bellingham bay in ballast, where she arrived about November 20; that the master did not purchase the cargo of apples, but after remaining at Portland until December 17, sailed for Shoalwater bay and elsewhere, without notice to libellant, and without payment of his wages; and that libellant remained on said sloop and did his duty as seaman thereon between October 28 and December 17, aforesaid.

The master, George Thompson, intervening for the interest of the owner, J. K. Thorndyke, answered the libel, denying the allegations thereof, and alleging that libellant shipped at Port Townsend on a general coasting voyage, to go wherever the interests of trade might require; that the libellant was to have one third of the profits of the voyage for his wages; that the master gave libellant notice of the sailing of the sloop from Portland, and libellant refused to go; that the sloop Christina is a coasting vessel of 13 $\frac{3}{4}$

The Christina.

tons burden, and up to the time libellant left her she had not earned expenses, and therefore the libellant is not entitled to any sum as wages.

The master and two seamen, Quaile and Fisher, were examined as witnesses on behalf of the libellant. No testimony was offered by the claimant. Quaile sailed in the sloop from Port Townsend, and Fisher was shipped just before the sloop left Portland for Shoalwater bay.

The master is the principal witness. His statements on the stand do not agree in some material respects with the allegations of the answer. Besides, the inquiry involves the propriety of his own conduct in the transaction to such an extent that the Court is inclined to take his statements with allowance. In the answer, he denies unqualifiedly that the libellant shipped for a voyage to Bellingham bay, thence to Portland, and thence back to the port of departure *or either of them*. On the stand, he admits that the sloop sailed for Portland to touch at Bellingham bay, where he expected to load with coal for Portland, but, not obtaining the coal, she proceeded in ballast for the latter port. He also admitted that he expected to meet a draft in Portland, with which he intended to buy a cargo of apples, or something else, and return with it to Port Townsend or Victoria, but that he did not receive the draft or he would have done so.

From the testimony of both the master and Quaile, it appears that when the sloop was about to sail from Port Townsend, the master asked the libellant if he would go with him on her to Portland; that the libellant replied in the affirmative and went aboard, as far as appears, without any stipulation as to the terminus of the voyage, other than that implied in the request and consent to go to Portland, or the rate or mode of payment of his wages.

The master also testified, that when at sea four or five days, he told libellant that he expected money at Portland to buy a cargo of apples, which he expected to take to Port Townsend; that he was to have one third of the profits of the voyage, and he would give libellant the same which the latter assented to; but insists that this understanding was

The Christina.

subject to his right to go any where else, in his discretion, on a general trading voyage on the coast, and that there was no explicit understanding how long libellant was to remain on board.

Quaile testifies, that after the first hiring at Port Townsend, he heard the master tell libellant that he would give him the same wages that he got himself, and that he heard the draft mentioned at same time, but nothing said about apples. *When* this conversation took place, the witness does not state, except that it was after the first hiring at Port Townsend. From the similarity of the circumstances, it is reasonable to infer that, so far as it goes, it is a part of the conversation testified to by the master as occurring four or five days at sea.

The master testified that he did not get the draft at Portland, and in consequence did not purchase the cargo of apples and return with them to Port Townsend, as he contemplated or might have done, and that after remaining at Portland until December 17, he took a cargo of freight for Shoalwater Bay, with the intention of returning to Portland with a cargo of oysters; that on that day, in the afternoon, he informed libellant of the intended voyage—that he might sail in ten minutes or three days—but when the sloop was ready, he intended to sail, if he went alone; and that libellant might make the voyage, if he wanted to, which he refused. In the course of the evening of that day, it appears that a conversation occurred at Shelby's store, between the libellant, his proctor, the master and Shelby's clerk, from which it is pretty evident that the libellant then contemplated arresting the vessel for his wages, and that the master and clerk were aware of or suspected that such was his intention. At that time the master said, in the presence of the libellant, that he would sail in the morning, but he testifies that afterwards the clerk advised him to sail that night, which he did do—getting under way about eight o'clock. The wind was very light, and at Sauve's Island, a distance of about eight miles, he laid by until the forenoon of the next day, when he proceeded down the Columbia

The Christina.

river with a light wind, pulling and drifting some of the time. There was a strong current in the river and no perceptible tide.

At the time of sailing libellant's clothes were not on the sloop, but were left with some one on a steamboat at the wharf, nor was the libellant on the sloop that afternoon.

While it appears to be true that the sloop left port in the night, without wind or tide, or other ordinary inducement for such sailing, I conclude from the evidence, that it was not for the purpose of preventing libellant from making the voyage to Shoalwater, but to avoid being arrested by him for his wages from Port Townsend to Portland. I think it sufficiently appears that libellant had already declined to make the particular voyage. Assuming this to be so, what effect does it have upon the libellant's claim for wages? This depends upon the nature of the hiring. It appears that by the first contract, at Port Townsend, the libellant simply shipped as a sailor for the voyage to Portland, without any special agreement as to the mode of payment or amount of his wages.

Upon this contract or state of facts, the libellant was not bound to proceed with the sloop any farther than Portland, and was entitled to the customary wages for the voyage performed. The maxim, that "freight is the mother of wages," does not apply, for the reason that having sailed in ballast for Portland, it was not expected that any freight would be earned. True, the sloop touched at Bellingham Bay, with the intention of taking on coal for Portland, *if it could be had*; but I think this was a mere incident of the voyage, without changing substantially its general direction or character. It only involved a detour of about fifty miles on an inland sea or water, on a voyage of at least three hundred and fifty miles. In the application of this hard, but necessary, rule, I think it just and reasonable to regard this voyage as one made in ballast and without any expectation of earning freight.

The only remaining question to consider is the nature and effect of the agreement said to have been made at sea, by

The Christina.

which the libellant was to have one third of the profits of the voyage to Portland and back to Port Townsend, in lieu of wages. It is very evident, that whatever might have been the ultimate intention of the master as to the nature and limit of the voyage, that he made the impression on the mind of the libellant, that he should have one third of the profits of a specific voyage from Portland to Port Townsend, with a cargo of apples, which the master was to purchase in the former place; and in this sense it must be understood and taken against the master. And, notwithstanding his testimony, it is not probable that the master had any other purpose at the time of the conversation with the libellant.

Such being the case, the contemplated voyage and venture were alike prevented or broken up by the failure to purchase the cargo of apples and by the sailing of the sloop to Shoalwater. The libellant was not bound to proceed on the new voyage or take a share in the new venture for oysters.

But if this alleged contract at sea, really was made as claimed and understood by the master, then it may be called a very indefinite edition of a class of shipping contracts which have been severely animadverted upon by both the English and American Courts of Admiralty; as for instance, when the shipping articles specify a voyage from a certain port to another "*and elsewhere.*" In some instances, where justice to the seaman required it, such a provision has been held void. Here, according to the master's testimony or professed understanding of the contract, notwithstanding the designation of certain ports in the agreement and the representations of specific arrangements for cargo, he was at liberty to continue this voyage as long and wherever upon this coast, as in his judgment the interests of trade might require. If such was the contract, and the law would enforce it, then the libellant was in effect tied to the deck of this particular vessel, as long as she remained afloat, if the master for any reason, or without reason, saw proper to keep on coasting for trade, unless he should desert, and thereby forfeit his earnings.

John Pendergrast v. Henry Lampman.

Again, this alleged contract is open to another objection. It does not appear to be regular or proper for a master to enter into new and special contracts with the seaman after the voyage is commenced, and while at sea. The relation between the parties is such, on board ship, at sea, that they do not deal upon equal terms. It may be that such contracts are not necessarily void, but in any event the circumstances under which they are made should be closely scrutinized, and if found, or appearing to be, prejudicial to the rights or interest of the seaman, disregarded.

In any view of the case, the libellant is entitled to recover the customary wages from the time of sailing from Port Townsend—October 28, 1861—until the departure of the sloop for Shoalwater bay—December 17, 1861. The customary wages, as appears from the proof, is \$30 per month.

Decree, that the libellant recover the sum of \$50 and his costs.

Edward W. McGraw, for libellant.

J. H. Mitchel, for claimant.

DISTRICT OF OREGON, DECEMBER 7, 1863.

JOHN PENDERGRAST v. HENRY LAMPMAN.

When one of the crew of a vessel resists a person in authority over him while in the discharge of his duty, the latter may lawfully use sufficient force to overcome such resistance.

DEADY, J. The libellant substantially alleges that on or about October 12, 1863, he shipped at San Francisco on board the steamship Sierra Nevada as a coal-passer, for a voyage to Portland and back; and that about three o'clock in the morning of October 24, while the vessel was lying at the wharf at Portland, the defendant being then and there first assistant engineer on said vessel, did willfully and wrongfully beat and seriously injure the libellant.

John Pendergrast v. Henry Lampman.

The answer of the defendant denies the allegations of the libel concerning the alleged assault, and alleges that on the morning in question the defendant went to the fore-castle to call the libellant to duty; that the libellant refused to obey, and finally struck defendant in the face with his fist, where-upon defendant resisted the assault of the libellant and used sufficient force to restrain the libellant from further acts of violence, and no more.

A number of witnesses have been examined. Only one of them—Harry Bruce—saw the inception of the affair, and only one other—Thomas Williamson—saw any portion of it. These witnesses both belong to the crew of the vessel, the former being a coal passer and the latter a saloon waiter. Three others of the ship's crew were also examined—Peter Mackie, the first mate, John Roche, a coal passer, and Joseph McLain, a water tender. Besides these, the libellant has examined three witnesses concerning his appearance after the alleged beating, as evidence of the extent of the injuries received, namely: John O'Connor, late mate of the steamboat Wilson G. Hunt; Edward Gallagher, the keeper of the whiskey shop where the libellant was drinking the night before, and John Sullivan, who was in the whiskey shop the same night. The libellant testified that he was on shore that night and went on board very drunk; and that he does not remember much about the matter, but thinks the defendant jerked him out of his berth and struck and kicked him.

After careful consideration, I am of the opinion that the account of the matter given by the witness Bruce is substantially the truth. His appearance on the stand, the manner of giving his testimony, and the intrinsic probability of his story, when compared with the known circumstances of the case, lead me to this conclusion. The scattered and disconnected circumstances testified to by other witnesses, after making due allowance for the effect of such partialities and sympathies as are likely to exist among comrades and cronies, do not materially conflict with his statement.

Upon this estimate of the value and probability of the evidence, I find the following to be the facts of the case:

That on the evening of October 22, the libellant went ashore and became intoxicated at the house of the witness Gallagher, and returned to the ship in that condition; that after being in bed some time, libellant was called and roused-up by the defendant to go on duty, but feeling tired and sullen after his debauch, he behaved ugly and refused to go; that then the defendant took hold of libellant by the shirt and shook him to rouse him up, when the latter assaulted the former by striking him, to which the defendant replied by a blow that knocked libellant down. It is difficult to say how much or severely the libellant was injured. It is evident that he got a hard blow on his face, that for some hours afterwards "bunged up" his eye. But, according to his own testimony, he could see out of it the next morning. The blow and its consequences was nothing more than any sailor who assaulted an officer of the ship, when engaged in the discharge of his duties, might expect. It would be justifiable in case of a similar assault by one stranger upon another while on the street. An officer who would allow one of the crew to strike him with impunity while on duty would be held in contempt by the crew, and be of little or no use to his employer.

The alleged injuries on the libellant's back are not proven, and it is highly improbable that they were inflicted at all. The one upon the groin appears to have been a trifling affair, and may have occurred by the libellant's striking against the carpenter's chest or chain cable in the vicinity of the affray. But suppose the defendant had even struck or kicked the libellant on the thigh, what then? The latter after he was brought down continued to scuffle with and resist the defendant, calling him by the most opprobrious epithets and threatening to kill him.

The defendant appears to be well known, and coal-passers who have served on this route under him, speak of him as a kind humane person who never "miscalls" or abuses his men. On the contrary, the libellant, so far as known, bears the reputation of being a turbulent and disagreeable man, except for a few days on the Wilson G. Hunt, while this

John Pendergrast v. Henry Lampman.

suit was pending. O'Connor, who was mate on the Hunt, says that he was peaceable and well-behaved while with him.

When the libellant got drunk and went on board in a condition which unfitted him for duty, he was unfaithful to his obligation, and to that, more than any other cause, he may attribute the trouble and bruises that followed. Not that I intend for a moment to countenance the idea that a seaman may be beaten or abused with impunity, because he is drunk, and particularly when he is insensible on that account. Far be it from this Court to so administer the law as to encourage or countenance cruelty towards the humblest of the crews in our boats and ships. They have their rights, and this Court will always endeavor to maintain and enforce them. But the law and Courts are not for the benefit of this class of people alone. The fore-castle is not all the world. The rights and responsibilities of the quarter deck or those in authority must be considered also. When seamen get drunk and act like brutes, they must not expect to be treated like sober, orderly men.

Decree, that the libel be dismissed and that the defendant recover costs.

E. W. Hodgkinson and Lansing Stout, for libellant.

Amory Holbrook, for defendant.

DISTRICT OF OREGON, MARCH 8, 1864.

THE PIONEER.

Exception for impertinence to an allegation in an answer which serves no legal purpose, and is a mere slur upon the libellant, allowed.

An allegation of misconduct on the part of an engineer as a cause of forfeiture of wages must state the particular acts of misconduct relied on, with the circumstances of time and place.

C. brought suit against the steamboat P. for wages as engineer; the claimant in its answer set up that prior to the commencement of such suit, it had commenced an action against U. in the Territory of Washington, to recover damages for injuries to the steamboat P., caused by the misconduct of the latter as engineer thereon, and caused a garnishee process to be served upon K., the master, and sometime owner of the steamboat P. during the period that C. was employed upon her as engineer: *Held*, on exception that the allegation was impertinent.

DEADY, J. The libellant in this suit seeks to recover the sum of \$1,497.25, the balance alleged to be due him for services as engineer upon the steamboat Pioneer, between November 8, 1862, and January 8, 1864.

The claimant, the Columbia Transportation Co., a corporation of the Territory of Washington, intervening for its interest as owner, answered the libel, to which answer the libellant filed sundry exceptions.

The first exception is taken to the words following: "And because he by neglect and his mismanagement caused great damage to the machinery of said boat." In the answer the fact herein alleged is stated as the reason for discharging libellant.

From the pleadings it appears that the libellant was hired by the month, or under such circumstances as that a hiring from month to month would be necessarily implied. Such being the case, the libellant might be discharged from the boat, she being in the home port, at the end of any month. Therefore, it is not necessary upon the part of the claimant to show any reason for his discharge. In fact, the libellant does not sue on account of the discharge, but for wages earned and unpaid. If it was intended to plead this mis-

conduct as a cause of forfeiture or diminution of wages, the particulars of the alleged neglect and mismanagement should have been stated with the circumstances of time and place. The exception is allowed.

The second exception is taken to the words following: "By reason of mutinous and disobedient conduct, incompetence and malicious mischief, causing damage as before stated." This allegation, in conjunction with other matters, in what is called the fifth article of the answer, is pleaded as a cause of forfeiture of wages. What has just been said in passing on the first exception as to the want of certainty, applies to this. The employment of the libellant extended over a period of one year and two months, and when he seeks to recover his wages, it would be a hardship if the question should be made to turn upon the truth or falsity of such a vague and indefinite charge. Besides, the misconduct of the libellant to work a forfeiture of his wages must be gross and serious, though for a less cause there may be a partial forfeiture or diminution.

Again, if a seaman is continued on board after an opportunity occurs to discharge him at the home port or the termination of the voyage, the law presumes that his misconduct has been overlooked—forgiven, and such misconduct cannot be set up as a defence to a suit for wages. In what month of the fourteen that the libellant was employed on this boat, "this mutinous conduct and malicious mischief" occurred, is not stated in the answer. Such conduct was a sufficient ground to justify the discharge of the libellant at once, but if the master or owner for any reason saw proper to continue him as engineer, it could not be afterwards set up as a cause of forfeiture of wages subsequently earned. When the hiring is monthly upon a river steamboat or other boat arriving and departing at short periods within that time, each month must be considered as analogous to a separate voyage at sea. The wages earned upon one voyage are not affected by the conduct of the seaman upon a former or subsequent one. So with the monthly wages of the libellant, they are to be considered as the wages of separate

voyages, and not affected by his conduct except during the time they were being earned. This exception is allowed.

The third exception is taken to an allegation pleaded in abatement of the suit. It states substantially that from March 20 to November 12, 1863, John T. Kerns—now one of the directors of the C. T. Co., and who as its agent makes the claim and answer herein—was the sole owner and master of the Pioneer, and that said Kerns employed the libellant during that time, at certain wages; that libellant remained on board until January 1, 1864, and during the last month of such employment—meaning, I suppose, December, 1863—he maliciously damaged the boat in the sum of \$1,000; that on January 6, 1864, the C. T. Co. brought an action in the District Court of the Territory of Washington against the libellant for said damages, and caused a summons to be served therein on said Kerns as garnishee; that said action is still pending, and that said Court had thereby acquired jurisdiction over the wages alleged to be due the libellant before the filing of the libel in this suit, and that any decree therefor in this Court would be a hardship and injustice to the claimant and said Kerns.

As an individual, Kerns has no other relation to the subject matter than as a director and agent of the C. T. Co., who is the claimant in this suit and the plaintiff in the alleged garnishee process against himself. It does not appear that the District Court of the Territory of Washington ever acquired jurisdiction of the person of the libellant in the action said to have been commenced therein. The allegation of the answer is, that the C. T. Co. "commenced a suit against the libellant," but whether he was ever served with process, so as to give the Court jurisdiction to proceed, does not appear, and cannot be inferred. There must be a distinct allegation to that effect. Assuming the fact to be as it appears in the answer, that the Territorial Court never acquired jurisdiction of the person of the libellant, the action alleged to be pending therein in no way affects his right to maintain this suit. The service of the garnishee process, being in advance of the service of the summons

upon the libellant seems to have been premature, and at best can only effect Kerns upon the condition that the libellant is brought into the Territorial Court and judgment obtained against him. In the meantime, I suppose it would not exonerate him from obeying the order of any other Court in relation to such debt, which might first acquire jurisdiction in the premises. Again, upon the face of the answer, Kerns does not appear to be responsible to libellant as master and owner for quite eight months wages, while this suit is brought for the wages of fourteen months.

But this suit is brought against the boat, and not Kerns. The seaman has a lien upon the boat for his wages, and this Court has jurisdiction to enforce such lien by a suit *in rem*. Although the master and owner are also personally responsible for the wages of the libellant, it is a question in my mind whether either of them, strictly speaking, owe him a debt that can be garnisheed, at least until he elects to look to them or either of them for his wages, by taking a personal obligation therefor, or commencing a suit against them for the same. Otherwise, the master might be garnisheed in one Court, the owner in another, while the seaman was prosecuting a suit *in rem*, upon the same demand, in a third one. But it not appearing that the libellant has ever been served with process in the action in the Territorial Court, I do not think the service of the garnishee process upon Kerns in any way affects his liability to the libellant or that of the boats. This exception is allowed.

The matter included in the fourth exception is a mere amplification of the allegations included in the second exception, with the addition of a counter claim of \$1,000 for damages caused by the alleged misconduct of the libellant. There is no more certainty or particularity in the allegation in the one case than the other. This exception is also allowed.

E. W. McGraw, for libellant.

Amory Holbrook, for claimant.

Ten Cases of Opium.

DISTRICT OF OREGON, MARCH 11, 1864.

TEN CASES OF OPIUM.

Goods of whatever growth or manufacture brought from a foreign port or place and landed at a port or place within the United States without a permit, are forfeited to the United States under Section 50 of the Collection Act (1 Stat. 665).

Foreign goods once lawfully admitted into the United States, if re-exported or voluntarily placed within the limits of a foreign jurisdiction, lose the character imparted to them by such admission, and if re-imported into the United States, it must be done in conformity with the law governing the importation goods of a foreign growth or manufacture from a foreign country.

If opium was shipped from San Francisco *via* the foreign port of Victoria to Portland, and while the ship was lying at Victoria the shipper of the opium should cause it to be taken ashore and placed in a house in Victoria, for even a few hours, or less time, and then cause it to be re-laden upon the ship and brought thence to Portland, such opium would be brought from a foreign port and liable to become forfeited by being landed without a permit.

DEADY, J. The information in this case was filed November 4, 1863. In the first count it is alleged that the opium was brought in the steamship *Sierra Nevada*, from the foreign port of Victoria to the port of Portland, and here unladen without a permit, and was seized as forfeited for this cause by the Collector on October 22, 1863. In the second count it is alleged that the opium was brought from and to the ports aforesaid, but not entered upon the vessel's manifest, and therefore became and was forfeited to the United States.

The claimant, Wha Kee, a Chinese merchant of Portland, on November 7, 1863, demurred to the second count because the facts stated were not sufficient to cause a forfeiture, which demurrer was confessed by the District Attorney.

On December 9, 1863, the claimant answered the first count of the information, denying that the opium became forfeited by reason of being unladen without a permit as alleged, or that the same was brought from any foreign

Ten Cases of Opium.

port, and alleging that said ten cases of opium was purchased by the claimant in San Francisco, about October 16, 1863, of one Pon Jib, who shipped the same to claimant at Portland, *via* Victoria, on the Sierra Nevada.

By the stipulation of the parties the cause was tried without the intervention of a jury, on March 7, 1864, and was continued for decision until March 11.

This seizure is made under Section 50 of the Collection Act of 1799, which declares: "That no goods, wares, or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen or delivered from such ship or vessel within the United States * * * without a permit from the Collector * * * for such unloading or delivery, * * * and all goods, wares, or merchandise, *so unladen or delivered shall become forfeited*, and may be seized by any of the officers of the Customs" (1 Stat. 665).

The answer must be taken to admit that the opium was landed without a permit. The allegation that it did not "become forfeited to the United States *by reason of being unladen without a permit*," is a conclusion of law, and not a denial of the averment that it was so unladen.

The only issue then arising upon the pleadings, is, whether the opium was brought from a foreign port or not.

From the admissions in the pleadings and the evidence the following facts are satisfactorily proven :

That between October 17 and 22, 1863, while the Sierra Nevada was lying at the harbor of Esquimalt, at Vancouver's Island, on a voyage from San Francisco to Portland, a Chinaman called Ching Sung, a partner of the claimant, brought two common-sized trunks in a spring wagon from Victoria, containing ten cases of opium, and caused them to be delivered on board the vessel; and that Dyer, the freight clerk, on account of certain suspicions which he then entertained and which will be hereafter noticed, did not allow Ching Sung to take these trunks to his state-room, as he desired, but directed the porter to put a mark upon them and stow them in the ship's hold.

Ten Cases of Opium.

That these trunks, containing the ten cases of opium mentioned in the information, were then brought on the Sierra Nevada to this port and here unladen, without a permit, and seized by the collector; and that Ching Sung came over from Victoria on the Sierra Nevada as a passenger, and in conjunction with the claimant made a claim to the trunks when they were seized as aforesaid.

These facts show that the opium was brought here from a foreign port and unladen without a permit. This makes a *prima facie* case for the Government, and the burden of proof is thrown upon the claimant "to establish the innocence of the importation, and to repel the supposed forfeiture." (1 Stat. 678; *Taylor et al. v. U. S.*, 3 How. 211.)

To overcome this case and establish his right to the goods, the claimant introduced evidence tending to prove that Ching Sung purchased this opium, on the claimant's account, of Pon Jib, a Chinese merchant in San Francisco, on October 17, 1863; that it was then packed in the two trunks in question and sent to the Chinese house of Lum Wa, where Ching Sung was then buying a general assortment of Chinese goods for the claimant's house in Portland; and that from the house of Lum Wa these trunks were carted with the other goods there purchased to the Sierra Nevada, and shipped for Portland, all the goods being shipped as freight and entered on the ship's manifest, except the two trunks, which were taken by Ching Sung into his state-room as baggage.

That Ching Sung sailed on the ship as a passenger, and upon her arrival at Esquimalt in the forenoon hired a wagon and went up to Victoria and visited the house of a Chinaman called Lum Wa, taking with him the two trunks with the opium purchased in San Francisco; that while at Lum Wa's, and at his request, Ching Sung opened the trunks and exhibited the opium to the former, when it appeared that the tin boxes or cans in which it was packed were rubbing or breaking one another, to prevent which they took them out of the trunks and repacked them, first wrapping them in newspapers, which proved to be Victoria dailies; that in the afternoon of the same day Ching Sung returned

Ten Cases of Opium.

to the vessel in the wagon, bringing with him the trunks and opium, which he attempted to take to his state-room, but was prevented by the freight clerk, who directed them to be stowed in the hold as above stated; and that Ching Sung was a stranger to Lum Wa, but had a letter to him.

This, I believe, is a fair statement of the claimant's case as he claims it to appear from the evidence. How far is it to be believed, considered with reference to its intrinsic probability, or the want of it and the known facts and circumstances of the case?

The witnesses in support of it, with one immaterial exception, are Chinese. The principal one—Ching Sung—is a partner of the claimants, and pecuniarily interested in the result; besides, being the principal actor in the transaction, he naturally would feel some solicitude for its success. The witness Joe was Ching Sung's companion on the voyage, including the visit to Lum Wa's, at Victoria, and is most probably under the control and influence of the claimant at this time.

Lum Wa testifies that the opium was in the trunks when they were brought to his place, but he is contradicted in some important particulars by Dyer, the freight clerk. On the day the *Sierra Nevada* touched at Esquimalt, Dyer visited Lum Wa's place in search of two packages of opium that were brought up on the vessel on that trip from San Francisco. He found the packages there, and he says they belonged there. In fact, Lum Wa was engaged in importing opium from San Francisco. Dyer also testifies that Lum Wa kept a store, and that he saw Ching Sung and Joe there, in the back room, with these trunks opened, containing these packages of opium, wrapped in Victoria daily newspapers. These are the circumstances that excited Dyer's suspicions, on account of which he directed the trunks to be stowed in the hold. Now, Lum Wa testifies that he kept a wash-house, and did not keep a store. Again, if Lum Wa really did furnish the opium in the trunks to Ching Sung to be smuggled in here, as appears probable, he would natu-

Ten Cases of Opium.

rally feel some interest in the result of the venture, in addition to the sympathy which he may be safely presumed to have for a countryman in trouble.

The effect of these circumstances is to place these witnesses before the Court somewhat in the light of accomplices. In addition, there is the direct pecuniary interest of Ching Sung in the result, and that the natural sympathy of all of them for the claimant as against the Government.

The only other material witness for the claimant is Pon Jib. He deposes unqualifiedly to the sale of opium to Ching Sung, as alleged in the answer. That it was packed in trunks similar to these, but what became of it he does not know, further than it was sent to the house of Lum Wa, where Ching Sung was making his principal purchases, such as sugar, silks, teas, etc. A drayman of San Francisco also testifies that he hauled goods from Lum Wa's to the Sierra Nevada for Ching Sung, and among the rest these or similar trunks, but what was in them then, if anything, he does not know. The rest of the goods—many of them being valuable in proportion to bulk—were shipped as freight and put upon the manifest, but the trunks were treated as baggage and taken into Ching Sung's state-room. Wilson, the servant who had charge of the state-room during the voyage, testifies that he handled the trunks and set them up on end before reaching Victoria, and that they were a "little heavy, not much"—in effect that they were light.

If these trunks, as claimed by the claimant, then contained opium of the value of \$1,575, they should have been entered on the manifest and shipped as freight. This circumstance itself is a badge of fraud, unless explained. The omission to do so, tends to show that the opium was not then in the trunks. The freight would have been but a trifle, and the goods would have been equally as safe as in the state-room, and more so.

The taking the trunks ashore at Esquimalt is not explained or accounted for on the supposition that they contained this opium at the time. No adequate cause or motive is shown for such an apparently useless act. Nor is there any suffi-

Ten Cases of Opium.

cient reason shown for Ching Sung's visit to Victoria under the circumstances. Lum Wa and he both admit that they had never seen one another before, and were utter strangers to one another. To my mind it is very unreasonable that Ching Sung would hire a wagon and go three miles to Victoria, simply to get his dinner with a stranger, who kept, as he says, a wash-house, while he was a merchant, and had his meals furnished him in his room on shipboard. Yet this is the only reason assigned for the visit. The vessel was only to remain at Esquimalt a few hours, and there would be hardly time to exchange greetings with Lum Wa and eat a dinner of ceremony. But why drag the trunks of opium along? Ching Sung's only reason is, that he was afraid they would be stolen if left in his room. The reason is not satisfactory. It is destitute of probability, and is evidently an afterthought.

This is the evidence of the claimant and upon its face it is improbable if not untrue.

But the testimony of Parker, the officer of the Customs who made the seizure, tends strongly to show that the answer to this alleged forfeiture is substantially false. The testimony of Mr. Parker is direct and positive, and notwithstanding the criticisms of counsel, I think entitled to full credit. The suggestion as to his interest in the forfeiture is answered by the fact that he is not entitled to any share of a forfeiture in a case where he is a witness. He states, that on the way up the Columbia river, Dyer communicated to him what he saw at Lum Wa's, and his subsequent suspicions, and said he would point out the trunks to witness when they reached Portland. When the trunks were put upon the wharf, Parker asked to whom they belonged. Ching Sung, who was present, claimed them. Wha Kee was also present. Parker asked them what the trunks contained. Both answered positively and unqualifiedly: "Bedding and clothing from San Francisco." The two Chinamen being then about to take the trunks away, Parker bade them desist and questioned them further. They repeated the statement that the trunks contained the bedding and cloth-

Ten Cases of Opium.

ing of Ching Sung. Parker then lifted one of the trunks, and finding it quite heavy for its size, ordered them to be opened. Wha Kee went up town for his keys, and on his return opened one of the trunks, which, in the language of the witness, "presented to view a soft, light, elastic bed-cover or comforter." Upon this, Wha Kee threw up his hands and exclaimed: "There, see!"—evidently intending, as Mr. Parker says, to convey the impression, that the fact was just as they had said, that the trunk contained "bedding and clothing." But Parker's faith was weak, and lifting up the bed cover he exposed the cases of opium to view. Wha Kee then admitted that the cases in the trunks contained opium, and when asked how they came to be wrapped in Victoria newspapers, he replied that "they—the papers—had been sent to San Francisco." Thereupon Parker took the trunks into his possession, and Wha Kee went away. About half an hour afterward he returned with an attorney, and upon some one suggesting that the trunks had been taken ashore at Victoria, unpacked, and the cases there wrapped in Victoria papers, Wha Kee at once caught at the suggestion, and said that was the fact, repeating the statement at length.

It is not necessary to comment upon the further portion of Parker's testimony, wherein he details a conversation between himself and Wha Kee, in September of 1863, in which Wha Kee, as Parker understood, sought to convince the witness that he could make money by letting opium pass the Astoria Custom House as *soy*, or "by shutting his eyes." Parker might have misunderstood his drift. Besides, I am afraid that the experience of the Chinese on this coast would naturally lead them to the conclusion that in their business relations or intercourse with American officials, the use of money was a lawful means on any and every occasion, and that what was so often exacted from them upon one false pretense and another, might without any impropriety be offered when a favor was asked.

The facts stated are sufficient for the decision of the case. The Government has made out a plain *prima facie* case. The

Ten Cases of Opium.

claimant has failed to overcome it; and not only that, but upon his own showing it is highly probable that the whole arrangement, from its inception, was a scheme to purchase opium of Lum Wa and ship it to Portland as a purchase made in the United States—at San Francisco—and upon which the duties were therefore supposed to be paid. The letter to Lum Wa is accounted for upon this supposition, and the whole transaction at Victoria admits of no other reasonable explanation, particularly when it is remembered that Victoria is a free port, to which opium is shipped out of bond from San Francisco in large quantities, and there sold without the payment of duties.

I am loth to conclude that Pon Jib has intentionally sworn falsely in this matter. His character for truth and veracity is testified to by three white men of San Francisco. He may have sold opium to Ching Sung, as he states; but if so, it must have been a part of the preparation of appearances by Ching Sung. The opium purchased of Pon Jib, if any, might have been left at Lum Wa's, and then Ching Sung having thus made it appear that there was opium in his trunks, might start with them in fact empty for Victoria and free opium.

I have been thus particular in examining this case upon the facts, more for the purpose of showing that this forfeiture is morally just, than otherwise. But, as a matter of law, the government is entitled to a judgment of condemnation, even if the facts were exactly as claimed by the claimant. Supposing that the opium was purchased in San Francisco, having afterwards been voluntarily landed at a foreign port, it then lost its former character or status. When the opium was brought back from Victoria, and placed on board the *Sierra Nevada*, and thence transported to this port, it was a technical importation of goods from a foreign port or place, and therefore such goods could not be unladen without a permit. The words of the statute are plain and comprehensive: "No goods, wares or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen," etc. It is said that this permit is a mere technical

Ten Cases of Opium.

regulation. So it is, in itself; but in effect it is a means to enable the officers of the Customs to have inspection of all goods brought from foreign ports, and collect the revenue, if any, due thereon. If goods once admitted into the United States from a foreign port are re-exported, the effect of such admission ceases, and if such goods are attempted to be re-imported into the United States, they must be taken to be what they are in fact—goods then brought into the United States from a foreign port or place, and not to be landed, on pain of forfeiture, without a permit. The time which the opium remained in Victoria, after being landed from the vessel, is not material. If one year would be sufficient to separate the goods from the vessel and place them within the foreign jurisdiction, so may one day or one hour be. It is not a question of time, but of what was done with the goods. If they were practically separated from the ship and the control of its officers as a part of her cargo, and voluntarily placed within the limits and jurisdiction of the Government of the foreign port of Victoria, as I think they were, they could not be afterwards brought to Portland and landed without a permit. They would come within the category of the Act—"goods brought from a foreign port." Acts declaring forfeitures and imposing penalties for violations of the revenue laws must be construed so as to accomplish the object for which they were intended. In the technical sense, they are not penal, but rather remedial—intending to effect a public good and prevent frauds. (*Taylor et al. v. U. S.*, 3 How. 210.)

Counsel for the claimant, assuming that this opium paid duty in San Francisco, sought to have it considered upon the footing of goods, the growth or manufacture of the United States, coming from a foreign port. But if the analogy would hold good, it would not help the claimant's case. Goods, the growth or manufacture of the United States, cannot be brought from a foreign port into the United States, and unladen without a permit, nor without evidence of their exportation and that they are in the same condition as when exported.

Ten Cases of Opium.

In *Knight et al. v. Schell* (24 How. 526), the plaintiffs manufactured at Newberg, N. Y., a number of barrels, and shipped them in three vessels to Cuba, where they were unladen and filled with molasses, when they were re-laden upon the same vessels and brought to New York. The defendant being Collector at the time, charged the barrels with the regular duty—24 per centum—upon their value at Cuba. The plaintiffs paid the duties under protest and then brought an action against Schell to recover them back. The Court decided against the plaintiffs—holding that the barrels were not returned in the same condition as when exported. Mr. Justice Clifford, in delivering the opinion of the Court, says: “When filled in the foreign port, the barrels have been applied to the commercial use for which they were manufactured; and when shipped with their contents, brought back to the United States, and are offered with their contents by the importer for entry at the Custom House, they have then, in respect to the Revenue laws of the United States, acquired a new character.”

So with foreign goods once lawfully introduced into the United States, if taken out of the country and landed at some foreign port or place, “in respect to the Revenue laws of the United States, they have acquired a new character.” They must pay duties as upon an original importation, and to this end it is forbidden to land them without a permit. That is this case, even upon the ground which counsel for the claimant seeks to put it.

But this is a more favorable view of the transaction than the facts warrant. I do not think Ching Sung purchased this opium in San Francisco, but in Victoria, and that it never paid duties to the United States. If the fact were otherwise, and it had been innocently landed at Victoria and then brought to Portland in ignorance of the law, Wha Kee and Ching Sung would naturally have answered Parker according to the fact, when asked by him what the trunk contained. Instead of this they prevaricated and sought to make the impression that the trunks contained *nothing* but “bedding and clothing,”—thus betraying a consciousness

The Pioneer.

of something wrong in the matter and a purpose to conceal it from the officer.

In accordance with these views the Court finds as a conclusion of fact that the opium in the information mentioned was, on October 22, 1863, brought to Portland, in the District of Oregon, from the foreign port of Victoria, and here unladen contrary to the statute without a permit, and as a conclusion of law that the said opium thereby became and is forfeited to the United States.

Judgment, condemning the goods as forfeited to the United States.

Edward W. McGraw, for the plaintiff.

W. Lair Hill, for the claimant.

DISTRICT COURT, MARCH 14, 1864.

THE PIONEER.

Rule of ascertaining rate of wages of seaman, where the contract is doubtful, in case of an engineer on inland waters, commented on and applied.

Misconduct by seaman upon one voyage does not enure to the benefit of the owner so as to forfeit wages earned upon another; in this respect the case of monthly hirings, although continuous, upon river boats, likened to separate voyages at sea.

A party cannot recover upon a contract prohibited by statute, although the statute contain no express declaration that such contract shall be void; therefore when libellant served as an engineer upon a steamboat from November 8, 1862, to July 13, 1863, without being licensed therefor by the United States Inspectors, he could not recover wages for such service, because it was within the prohibition of Section 9, Sub. 10, of the Act of August 30, 1852. (10 Stat. 67.)

Appropriation of payments—the rule stated and applied.

DEADY, J. Patrick J. Conlisk brings this suit to recover wages alleged to be due him for services as engineer on the steamboat Pioneer, for the fourteen months between November 8, 1863, and January 8, 1864. The libel was filed January 16, 1864, and alleges that there was no contract as to time of service or rate of wages, but that the current

The Pioneer.

wages of such service during the period mentioned was \$150 per month; and that the amount of the wages earned by libellant during this period of fourteen months is \$2,100, upon which there has been payments to the amount of \$602.75, leaving a balance of \$1,497.25 due the libellant, for which he prays a decree.

The claimant, the Columbia River Transportation Co., a corporation of the Territory of Washington, intervening for its interest as owner of the Pioneer, answered the libel on March 7, 1864. The answer admits the performance of the labor by the libellant as alleged except for the five days between February 9 and 16, 1863. It denies that the hiring was without agreement as to the amount of wages, and alleges that libellant was first employed at his own solicitation, upon a representation or promise to the then owner, George Kellog, to work for less than \$100 per month; that the master of the Pioneer afterwards promised to pay libellant \$100 per month, but the current rate of engineers' wages, on such boats as the Pioneer, was not more than \$75 per month; that the libellant was not qualified or authorized to act as engineer, not being duly licensed as such, and did not faithfully perform his duties as such, and that he was paid on account the sum of \$680.82.

Other defensive allegations in the answer were disposed of by the decree upon the exceptions thereto for impertinence.*

A number of witnesses, including the libellant and the different owners from the commencement of the former's employment to the present, have been examined. With a few unimportant exceptions the witnesses appear to be interested, not only in the event of the suit, but in the controversy and the statements of the libellant, and owners, are conflicting.

The first question is, to what rate of wages per month is the libellant entitled? There was no written agreement or shipping articles signed. Upon this fact counsel for libel-

*The Pioneer, ante, 58.

The Pioneer.

lant makes the point that the case comes within the provision of the Act of July 20, 1790 (1 Stat. 131), concerning the hiring of seamen, and that therefore the libellant is entitled to the highest wages paid engineers within the three months next preceding his employment. I think not. This Act is confined by its terms to vessels bound to a foreign port, or of fifty or more tons burthen bound to a port in any other than an adjoining State. From the pleadings it appears that the Pioneer coasted between the ports of this State and such ports, and the ports of the Territory of Washington.

The libellant swears positively that there was no agreement as to the rate of wages which he was to receive, while *the owner of the boat from* November 8, 1862, to March 23, 1863, testifies that at the time of employing libellant, he told him that he had been paying \$100 per month, and that the libellant replied he was willing to work for less. On March 23, 1863, the master, John T. Kerns, became the sole owner of the boat, and remained so until the sale to the claimant, the C. R. T. Co., of which he is a director. Kerns testifies, that at the time of purchasing the boat he made out libellant's account, crediting him with his wages at \$100 per month, and presented it to him, and that the libellant made no objection to it. On the contrary the libellant swears that he did object to it and would not receive it, but the objection he made at the time, was not to the amount of the wages, but that the account was made out *against the owner*, and not the boat—saying that he did not understand that, and only knew the boat. The reason given for the objection to the account, shows pretty conclusively that it was not made to the rate of wages, but the security.

Two witnesses, employed in inferior positions on the boat, testify to conversations with the libellant in which they state that he admitted that he was only getting \$100 per month, but that he intended to claim or have \$150 thereafter. An engineer testifies to a conversation between libellant and Kerns, in which the former demanded \$150

per month, at that time, and in which there was something said about the wages for the time prior thereto, but he could not state particulars. The libellant and Kerns both testify concerning this conversation. The former says that he then demanded \$150 per month, and that Kerns did not say whether he would give it or not, but said that libellant was trying to take advantage of the fact that the boat was in debt to him, and unable to pay. Kerns admits this demand for \$150 per month, but says that he told libellant he could not pay it. Both these conversations with libellant evidently occurred near the same time; Kerns says the one with him occurred about December 1, 1863, but the other witnesses speak of October in the same year.

These are all the material circumstances bearing on the question of whether there was an agreement as to the rate of wages or not. According to the authorities, where there is a doubt as to the rate of wages due a seaman, it should be resolved in his favor. In general this is a wise and just rule, founded upon correct observation of the relations between seamen and their employers. The latter can always protect themselves by having shipping articles signed, or in the case of steamboats on short routes by payments or settlements at short intervals. But I think the rule ought to be applied in this case with some reference to the circumstances. From these it appears that, in the fall of 1862, George Kellog, a doctor and landsman, was the owner of a small steamboat called the Pioneer. She was propelled by a single engine, and her machinery was cheap and rickety. Her master—Kerns—was practically a landsman. The boat had no established trade or route, but was knocking around on the waters of the lower Columbia and Wallamet rivers, amid a strong force of first-class boats, doing a sort of peddling, desultory, sporadic business. At times, Kerns was acting as master, clerk, "and all hands"—trying to make the boat pay her way. Under these circumstances, the libellant, an old engineer from the lakes, came to this country seeking employment, and at his own solicitation was employed upon the boat as engineer. Knowledge and experience were on

his side, and under the circumstances he was as likely to take care of himself in a bargain as any of his employers.

Of course the law rates the libellant as a seaman, and he is therefore entitled to the rights of a seaman, particularly in having a lien upon the boat for the wages due him; but in the matter of a bargain with the master or owners of the Pioneer, I think these circumstances show that the parties in fact dealt on about equal terms, and that therefore the rule spoken of should be applied in moderation and with caution.

The evidence shows that first-class engineers have been receiving from \$125 to \$150 per month, but these are principally employed on good paying boats. Others appear to make the best bargain they can, depending somewhat upon the size of the boat and its business. Before the libellant went upon the Pioneer, her engineer was getting \$100 per month.

From the premises, I find that the libellant was employed without any express contract as to the rate of wages, but being a stranger and desirous of employment and an opportunity to become acquainted with the rivers and business, he was more anxious to obtain a situation than to obtain the highest wages; that the sum of \$100 a month was talked about at the time of the hiring, and subsequently acted upon by the libellant and the master and owners, and that under all the circumstances the law implies a hiring at that rate; that sometime in the fall, or December of 1863, the boat being unable to pay expenses, and being indebted to libellant, he demanded wages at the rate of \$150 per month, and Kerns remonstrated against this demand, telling him that the boat was unable to pay more.

The libellant may have thought, as men in such circumstances sometimes do, that as the boat was unable to pay him what was due him, he would take advantage of his power as a creditor to fix the rate of his wages. Be this as it may, Kerns, without admitting or promising anything, put him off the best way he could, hoping to make some disposition of the boat, so as to put her affairs and prospects in a better plight.

The demand for higher wages would not constitute a contract and make the boat liable therefor, unless with the assent of Kerns. Considering that the boat was embarrassed, and that the libellant had a large claim against her, I do not think such assent ought lightly to be implied. It was not expressly given, nor do I think there is reason to imply it. The reply of Kerns that the boat was not able to pay the higher wages, was a qualified refusal of the demand. At that time the boat was in port, unemployed half her time, and it seems to me that the libellant was taking the advantage of his claim for past services, to try and compel her owner to raise his wages. If the libellant was not satisfied to work for \$100 per month, he might have gone elsewhere. What was due him he could have collected off the boat.

I also find that the libellant is entitled to the wages of \$100 per month from November 8, 1863, to January 8, 1864, and that he has been paid on account in one way and another, the sum of \$671.62, leaving a balance of account in his favor of \$728.30.

In coming to this conclusion I have considered the libellant as in the employ of the boat during the five days in February, when the answer alleges he was discharged. It is a small matter. The alleged discharge seems to have been a kind of conditional one, depending somewhat upon the boat's necessities and opportunities to get business. The crew were nominally discharged, but they were to continue to run the boat if they could pick up any jobs. But, of course, I admit that the libellant might have been discharged at that time, without the payment of the wages due. Certainly the libellant could not fasten himself upon this boat against the wishes of her owner, until his accruing wages eat her up, simply because the owner did not, or could not, pay him off. The boat was good for the wages already earned. I have also considered the libellant as entitled to wages until January 8, 1864, although he was actually discharged on January 5. The hiring must be construed to have been monthly,* and as the discharge took

* *The Pioneer*, ante, 58.

place three days before the expiration of the month for no reason other than the pleasure or necessities of the owner, the libellant was entitled to his wages for the whole month.

Next, the claimant seeks to diminish whatever sum may be found due the libellant as wages by proof of misconduct on the part of the latter. But the most of the proof in support of this allegation suggests that the claimant, in making it, was trying to keep even with the libellant's charge of \$150 per month.

The machinery was shown to have been out of order a good deal, but I think this is more likely to have been the fault of the machinery itself, than the libellant. The boat was poor, earning little or nothing much of the time, and the libellant had to make repairs as best he could. As to the disobedience concerning the belt and sawing wood, it was but a single act near the end of his employment. Taylor, who was master at the time, was a landsman and new hand at the wheel, and seems to me to have provoked the engineer by trying to make himself particularly offensive concerning the sawing of this wood. The evidence concerning the working the engines when the boat was at the shore, but not made fast, is the only other proof of misconduct. I am inclined to think the engineer was simply mistaken as to the line being out, and was working the engines to keep steam down. There is also some evidence that the libellant at times was cross and ugly, and had difficulty with the men. With Kerns he seems to have got along pretty well. It is probable that the libellant is not a very agreeable man, and being in charge of poor machinery, often getting out of order, working with a lot of green landsmen trying to run an unlucky boat, it is not remarkable that his temper should sometimes get the better of him. An engineer should be not only obedient, but respectful to the master; but misconduct to forfeit wages should be satisfactorily proven and be of serious import.

Again, a sufficient answer to all these charges of misconduct is found in the fact, that the libellant was continued in his employment and position as engineer. The boat was in

port every day, and there was no legal or physical necessity for continuing to employ him. By continuing to employ him month after month, the presumption is, that his misconduct, if any, was overlooked and forgiven, and so Kerns says, "I overlooked it." The hiring being monthly, I think each month's service must be considered as a separate voyage at sea. Misconduct during one voyage cannot be made to work a forfeiture of wages earned during another. (*Piehl v. Balchen*, Olcott 24.)

The owners of a steamboat ordinarily have the power to protect themselves from misconduct of any of the crew, by discharging a man whose conduct is not satisfactory. This doctrine of forfeiture or diminution of wages is particularly applicable to voyages at sea, where it is often impossible to discharge a disobedient or negligent seaman, for months together. I do not think that any such misconduct is *proven* as entitles the claimant to a diminution of wages, or that it is a case for diminution of wages, except for some misconduct occurring during the last month of the libellant's employment.

One other question remains to be disposed of. It is alleged in the answer, that the libellant was not authorized to serve as engineer for want of a license. The evidence is, that he was duly licensed by the supervising inspector for the district, on July 13, 1863, and that between November 8, 1862, and the last mentioned date he was not licensed, and that he had been a licensed engineer on the lakes between the years 1857 and 1860.

The Act of August 30, 1852 (10 Stat. 67), declares that:

"It shall be *unlawful* for any person to employ or any person to serve as engineer or pilot on any such vessel, who is not licensed by the inspectors, and any one so offending shall forfeit \$100 for each offense."

Upon this provision it is maintained by the claimant that the libellant cannot recover wages for the period he was not licensed. I think such is the effect of the Act beyond a question. When a statute makes a certain thing or act *un-*

lawful, no contract to do or perform such thing, or act is valid, or can be enforced.

In *Bartlett v. Vinor*, cited in Chitty on Con. 599, Holt, C. J., said: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter, *because a penalty implies a prohibition*, though there are no prohibitory words in the statute." (See note 1, Chitty on Con. 599, where the American authorities are cited to the same effect.)

It would make prohibitory statutes nugatory and of no effect, if parties could act and contract in violation of them, and thus require the Courts to enforce and uphold such contracts and doings. The law leaves the parties to such contracts where it finds them. It follows that the libellant is not entitled to recover wages for the period in which he served as engineer without a license, and in violation of the Act.

This conclusion makes it necessary to ascertain and determine upon what part of the service, the lawful or unlawful, the payments made to the libellant shall be appropriated. Treating the wages earned during these two periods, or even the wages of each separate month, as distinct debts, the law gives the debtor the right to appropriate the payment to either or any of the debts, but he must do so at the time of payment, and by some act, word, or other means, to the knowledge of the creditor. Such an appropriation may be implied from circumstances as a previous refusal on the part of the debtor to pay one of two debts. (*Taylor v. Sandiford*, 7 Whea. 20.) But if the debtor makes no appropriation of the payment, then the right attaches to the creditor in the same manner, except that it appears he may make the appropriation at any time thereafter before an action or controversy concerning the same. After this, the authorities differ as to the creditor's right to appropriate, but the weight of them seems to be that he may. (Chitty on Con. 645, n. 1.) If neither the debtor or creditor has appro-

priated the payment, the Court must apply it as appears to be the most equitable and just, other things being equal, giving the preference to the claims with the poorest security. (Id.) As between a *lawful* and *unlawful* contract, the law will appropriate a general payment to the former in preference to the latter, but it seems that the creditor may appropriate such payment upon the *unlawful* contract, or upon a debt barred by the Statute of Limitations. (Chitty on Con. 646-7-8.)

Appropriating these payments upon these rules and principles, or rather determining what appropriation, if any, was made of them by the parties, there is no doubt that all of the payments made before the lawful hiring commenced, were made and received on account of the wages earned upon the unlawful contract. There was then no other debt to apply them on. There does not appear to have been any express appropriation by either party, but bearing in mind that the parties regarded the wages for each month as equally due the libellant, I think it reasonable to infer that all the payments were made and received on account of the older debts. This conclusion is the more reasonable in this case, because as between the parties, the indebtedness does not present that well defined instance of *distinct* debts to which the doctrine of appropriation applies. More correctly speaking, this is the case of a running account, or a continuous series of separate accounts, treated by the parties as an entirety. In such cases, the doctrine of appropriation does not apply, and general payments are presumed to have been made in discharge of the earlier items of the account. (Chitty on Con., 649, n. 2; *United States v. Kirkpatrick*, 9 Whea. 737).

The libellant is entitled to recover his wages at the rate of \$100 per month from the date of the lawful hiring—July 13, 1863—until January 8, 1864, a period of six months less five days, amounting to \$583.33½. The wages for the eight months and five days during which the libellant was employed without license, cannot be recovered, but the payments are presumed to have been made on that account.

The Jenny Jones.

This leaves the sum of \$145.04 $\frac{2}{3}$ of the libellant's account unpaid, and for which he cannot recover. Decree, that the libellant recover the sum of \$583.33 $\frac{1}{3}$, with costs.

E. W. McGraw, for libellant.

Amory Holbrook, for claimant.

DISTRICT COURT, JULY 11, 1864.

THE JENNY JONES.

Where a jettison of cargo becomes necessary for the safety of the vessel, the owner and vessel are liable for the loss, if the peril of the ship is directly attributable to the want of diligence or skill upon the part of the master or crew.

Where a vessel came into the Columbia river without a pilot and without any imperative necessity for so doing, and owing to the want of knowledge on the part of those in charge of her, as to the usual state of the tide and wind at that season of the year and time of day inside of Cape Disappointment, such vessel was thrown upon Sulphur Spit, and was compelled to throw over part of the cargo, the owner and vessel were held liable for the loss, because the same was directly attributable to the unskillfulness and ignorance of the master, in attempting to cross the bar when and as he did.

DEADY, J. Janion, Green and Rhodes, of Victoria, bring this suit to recover the value of certain goods shipped by them on the schooner Jenny Jones, from Victoria to Portland, and not delivered.

The libel was filed July 6, 1864. The respondent and claimant, James Jones, appeared and answered the libel on July 7, and by consent of parties, the cause was set for trial at once.

By the pleadings it is admitted, that the schooner, on May 10, 1864—the claimant being both owner and master—sailed from Victoria for Portland, having on board two hundred mats of sugar and ten hogsheads of ale belonging to the libellants, to be delivered to their consignees, Ladd, Reed & Co., at the latter port; that the claimant signed the usual bills of lading, and was to receive certain freight and

The Jenny Jones.

primage for the carriage of the goods; and that the goods were never delivered.

As an excuse for the non-delivery of the goods, the claimant pleads in his answer, "that on May 14, 1864, said schooner being properly in the pursuit of her voyage, by the dangers and perils of the sea, stress of weather and the unavoidable causes of accident connected therewith, and without negligence of the respondent, was thrown upon the shoals and a sand spit at the entrance of the Columbia river, * * * * in the midst of the breakers therein, and then was momentarily in danger of total wreck of said schooner, and loss of all her cargo, and the crew and passengers," and that to save the vessel, crew and passengers, the claimant then and there caused the goods of the libellant, together with other goods on board, to be thrown overboard. The answer also denies negligence, and that the goods were of the value alleged in the libel—\$858.70.

On the trial it was admitted that on the day of the wreck, May 14, the pilot boat of the Columbia river bar, was inside the bar, and that the pilot thereon saw the schooner approaching, and would have gone out to her, but the wind would not permit; and, also, that the goods were of the value alleged in the libel. The bills of lading were produced and contained the clause: "the dangers of the sea only excepted." A number of witnesses have been examined, including the claimant, and one of the crew of the schooner—Richard Downie—touching the propriety of the schooner's attempting to cross the bar when she did without a bar pilot, and the necessity of the jettison.

On the argument, it was practically admitted by counsel for libellants, that after the schooner struck or grounded, it was necessary to throw over the cargo to get her off and save the lives of the passengers and crew. The schooner was heavily laden with pig iron, the goods of the libellants were stowed on top, and it was necessary to throw out most of the cargo, to lighten the vessel over the sand spit on which she grounded.

The Jenny Jones.

The right to recover turns upon the question of whether the schooner was properly navigated in crossing the bar as she did. The evidence^a bearing upon the question, establishes the following facts:

That the Jenny Jones, with assorted cargo and twenty passengers, after a voyage of three days from Victoria, made the offing near the mouth of the Columbia river, about seven o'clock P. M. of May 13; that the pilot boat was inside of Baker's Bay, but could not be seen from the schooner; that there was a smart northwest breeze outside, and the vessel was in good condition and well provided, so far as appears; that the schooner stood off the mouth of the river until half-past four o'clock in the morning, when she stood in for the bar with a fresh breeze from the northwest, where she arrived about six o'clock, and sailed in the north channel, having about twenty minutes before set a signal for a pilot, without, however, delaying on that account; that about a mile inside the bar and near Cape Disappointment, it is necessary to haul to the northward, and at this point the wind died away, and the schooner met the ebb tide with very heavy rollers, two or three of which struck her on the port bow, and drove her over on Sulphur Spit, on the south side of the channel; that finding the schooner going on to the spit sideways, the sailing-master, Spenser, turned her head on, in the hope of being able to drive her across it into the south channel, but the water was too shallow, and the schooner grounded at about half-past seven o'clock; that about seven o'clock P. M. of the same day, after throwing over about two thirds of the cargo, the vessel with the flood tide and a fresh breeze, got over the spit into the south channel, and reached Astoria that evening, leaking and considerably damaged.

That from the nautical almanac it appears that on May 14, flood tide on the bar would commence about one o'clock A. M. and run for six hours, and again about one o'clock P. M. and run for same time; that, in fact, the duration of the flood tide on the Columbia river bar is governed by the stage of the water in the river, and the

The Jenny Jones.

strength and duration of the northeast winds, and that sometimes owing to these causes the flood tide is scarcely perceptible; that during some weeks in the months of May and June, owing to the melting of the snow in the mountains, there is always high water in the Columbia river, and a strong current outward at the mouth; that this year the rise in the Columbia came early, and was stronger than usual at the time the schooner came in, and for that reason the flood tide did not run more than four or five hours on the morning of May 14; that although a northwest wind is a fair one for a vessel bound in, yet in the morning, in the spring season, it often dies away near Cape Disappointment, and then you meet a northeast wind inside; but in the afternoon a vessel is most likely to carry the northwest wind to Astoria, several miles above Sulphur Spit, at which point the dangers of the navigation cease, and not before; that the claimant is not an experienced seaman, and has but little knowledge of the Columbia river bar, but that he relied upon Spenser, his sailing-master, who had taken the schooner out over the bar in April previous, and about a year before had taken some small craft in and out a few times; and that several persons of more or less experience in crossing the bar, testified on the trial, that under the circumstances they would have done as the claimant did, and attempted to bring the schooner in without a pilot.

Upon these facts the question arises, was the jettison the result of unavoidable accident, or may it fairly be attributed to the want of skill and prudence in the navigation of the vessel?

The contract and business of the claimant was that of a common carrier, and the law wisely imposes upon him the duty of using all reasonable skill and prudence in the performance of his undertaking. The clause in the bill of lading—"the dangers of the sea only excepted," does not limit the liability of the carrier. The law, in exempting a common carrier from responsibility for unavoidable accidents, silently attaches such a clause to all contracts for the carriage of goods for hire.

The Jenny Jones.

But if the loss is directly attributable to human agency, then it is not caused by unavoidable accident, whatever may be the immediate cause of such loss. For instance, although it be admitted that the loss of the goods was unavoidable at the moment they were thrown over, yet if the goods were placed in this peril and necessity by the want of ordinary diligence—reasonable skill and prudence—in navigating the schooner under the circumstances, the loss is directly attributable to human agency, and the carrier is liable. (Story on Bail. § 512.)

Was the master justifiable in coming in without a bar pilot? As far as the pilot is concerned, he had a legal right to do so, but so far as shippers are concerned, if he omitted to take a pilot, except under circumstances of imperative necessity, he took the risk of all accidents which are attributable to that cause. Under such circumstances the master, owner and vessel are liable to the shipper for any injury resulting from a want of that knowledge which might have been obtained by the employment of a pilot concerning the condition of the tides, currents, winds, shoals, or other matters affecting the navigation of the river.

There was no imperative necessity for bringing the schooner in without a pilot. Taking half tide as the proper time to come in, so far as the tide is concerned, the schooner should not have attempted to come in before four o'clock A.M., May 14. This was about daylight when the schooner was yet some distance at sea. But for another reason it was not proper to attempt an entrance until the afternoon of that day, because in the morning, a vessel was liable to lose the wind behind Cape Disappointment, and at the same time meet a strong ebb tide by reason of the unusual current in the river. I do not think the master ought to have expected a pilot to take him in before the flood tide in the afternoon of May 14, as that was really the first time it could be *safely* undertaken after the schooner reached the bar. It appears that it is not unusual for a vessel to lay off the mouth two or three days for a pilot. If there was a steam tug on the bar, as there ought to be, there would be no

The Jenny Jones.

necessity for delay in piloting in a vessel, except in rare instances.

Counsel for claimant maintain that Spenser is shown to have been a competent pilot, although not a licensed one, and that is sufficient. The evidence upon this point does not satisfy me of that fact. The master testifies that he signaled for a pilot twenty minutes before he went in, and unless this was intended at the time as a mere make-believe, it indicates pretty plainly that he thought he needed one. Spenser may have been as able, with the assistance of a chart, to follow the channel, as any one. But he does not appear to have been acquainted with the local causes that affected the flow of the tide, or the peculiarities of the wind at certain seasons of the year and times of day, and upon knowledge of these, and the like, depends, in a great measure, the competency of a bar pilot.

But admitting that Spenser was competent to navigate the schooner on the occasion, with reasonable skill and prudence, did he do so? I think not. He was probably ignorant of the impropriety of attempting to cross the bar on the last of a flood tide, because he was unaware of the unusually strong current in the river, and the prevalence of the northeast wind on the inside. But all these facts were known to the local pilots, and if the master had availed himself of this knowledge by the employment of one of these, as he was bound to, the loss, so far as can be seen, would not have occurred.

Upon the concurrent testimony of the witnesses as to the usual condition of the tides, current and winds, at that season, it appears quite probable that the vessel came in at an improper time of the day and stage of the tide, and the result of the experiment proves such to have been the fact. The freshet in the Columbia was earlier than usual this year—a fact of which Spenser appears to have been ignorant. Had this been otherwise the flood tide might have lasted until the schooner reached Astoria, and thus carried her by the spit after she lost the northwest wind.

The Jenny Jones.

I find that the jettison of the libellant's goods, although unavoidable at the time, was nevertheless the direct consequence of the conduct of the master, in entering the river at an improper time of tide and wind, which might have been avoided by waiting a reasonable time for a qualified pilot, and that therefore the claimant and schooner are both liable to the libellants for the value of the goods with legal interest from the time they should have been delivered—say May 20, 1864.

It will be observed, that in coming to this conclusion, I have not given much heed to the testimony of certain witnesses, who declared that if they had been in command of the schooner, under the circumstances, they would have brought her in without waiting for a pilot. They might have done so, and doubtless think they would, but if they had, and a similar loss of cargo had been the consequence, they would have been liable for it. The law imposes a certain obligation upon a common carrier. He must use ordinary diligence to avail himself of the knowledge and means necessary to transport safely the goods bailed to him. Whatever these witnesses may think or say they would have done under like circumstances, it is manifest to my mind that the risk incurred in bringing the schooner in when she was without a competent pilot, was unnecessary, and betrayed a reckless disregard of duty or a want of reasonable skill and knowledge on the part of the claimant.

Decree, that the libellant recover the sum of \$858.70, with legal interest from May 20, 1864, with costs.

David Logan, for libellants.

Lafayette Grover, for claimant.

The Maria.

DISTRICT COURT, JULY 26, 1864.

THE MARIA.

A sale of a vessel to a corporation organized and existing under the laws of a foreign country, is a sale "to a subject or citizen of a foreign prince or State," as the case may be, within the meaning of Section 16 of the Registry Act (1 Stat. 295), without reference to the nationality or citizenship of the shareholders therein.

But if such corporation were not a subject within the purview of such section, then if any of the shareholders therein were such subjects, such sale would be thus far, and therefore "in part," a sale "to a subject or citizen of a foreign prince or State."

A sale upon credit, and upon the condition that the purchaser shall not use the vessel until the purchase money is all paid, and that if default is made therein, the seller may retake the vessel into his possession, is a sale within such Section 16.

Sale of vessel to a subject of a foreign prince, how and by whom made known, and upon whom, is the burden of proof concerning the omission to make such sale known.

Upon the sale of a vessel to such subject, she is no longer entitled to the benefit of her American register; and if she is afterwards navigated thereunder, it is a violation of Section 27 of the Registry Act (1 Stat. 298).

An unlicensed engineer cannot recover wages for services on a steam vessel engaged in carrying passengers on the waters of the United States.

DEADY, J. This suit is brought by the United States to enforce a forfeiture of the steamboat Maria, for alleged violations of Sections 16 and 27 of the Registry Act, of December 31st, 1792 (1 Stat. 295, 298), which read as follows :

"SECTION 16. If any ship or vessel * * * which shall be hereafter registered as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence, or otherwise, to a subject or citizen of any foreign prince or State, and such sale or transfer shall not be made known, in manner hereinbefore directed, such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited."

"SECTION 27. If any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of this Act, such ship or vessel shall be forfeited

The Maria.

to the United States, with her tackle, apparel, and furniture."

The libel of information was filed on the date of the seizure—March 3d, 1863—and the first article thereof, alleges that the Maria, at the port of San Francisco, on July 29, 1858, was duly registered as an American vessel, of 69 $\frac{3}{4}$ tons burthen, with William Lubbock sole owner and master; that in August, 1858, the Maria cleared from the port aforesaid for the foreign port of Victoria, where in the year 1859, she was sold and transferred to a foreign corporation—The British Columbia and Vancouver's Island Steamboat Co.—the same being a body corporate under the laws of Vancouver's Island, and composed in whole or in part of aliens; that afterwards—about August 8, 1862—the Maria entered at the port of Astoria, in the District of Oregon, with Robert Haley as master, the same being the first American port that she had entered after the sale and transfer aforesaid, and said master did not then make such sale known to the collector at Astoria, but fraudulently and wrongfully concealed the same therefrom, whereby the Maria became forfeited, etc.

The second and third articles of the libel are substantially the same as the first, except that in the third, it is further alleged, that said Lubbock first sold an interest in said vessel to certain persons at Victoria, citizens of the United States, and that afterwards said Lubbock, and such other persons, sold and transferred her to the foreign corporation aforesaid; that upon the entry of the vessel at Astoria, said Haley filed the American register aforesaid, with the collector of that port, together with a certificate of Allen Francis, United States Consul at the port of Victoria, dated July 31, 1862, to the effect that the Maria was then owned by one John T. Wright, of San Francisco, and also his own affidavit that he was an American citizen and master of the Maria, and did then and there demand of and apply to the collector, for a coasting license for said vessel.

The remaining article alleges, that the American register aforesaid was by the said vessel knowingly or fraudulently

The Maria.

used at the port of Astoria, at the time of her entry then as aforesaid, she not being then entitled to the use of such register, according to the true intent of the Act of December 31, 1792, whereby the Maria became forfeited, etc.

On April 1, John C. Gibson, intervening for his interest, answered the libel, wherein he alleged there was due him for services as engineer upon the Maria, at the wages of \$200 per month, from July 27 to November 8, 1862, the sum of \$728, and also \$256 advanced by him about August 26, 1862, to the master and clerk, to purchase necessary supplies for said vessel.

On April 6, John R. Fleming filed a claim of ownership and answered the libel, denying all the material allegations therein, except the ones concerning the issuance of the register to the Maria, at San Francisco, her sailing to the port of Victoria and remaining there until her entry at Astoria.

On April 13, the claimant, Fleming, answered the claim of Gibson for wages and money advanced, wherein he denied all knowledge of money advanced, but admitted that Gibson served as engineer from July 28 to September 17, 1862, for which he was entitled to the customary wages of \$150 per month, and the further sum of \$11 expended by him for board while engaged in repairing the vessel, which amounts had been duly tendered to said Gibson and by him refused; alleges that Gibson was employed by one John T. Wright, who then owned the vessel, and that as soon as claimant came into possession of the vessel—about September 17, 1862—he discharged Gibson.

On April 6, the libellant filed exceptions to the claim of Gibson for money advanced to the master and clerk; and on the same day Robert Haley aforesaid, as agent of William M. Lubbock aforesaid, filed a claim of ownership and answered the libel, denying thereby all the material allegations of the same, except the ones admitted by the claimant Fleming, and alleging that said Lubbock is the sole owner of the Maria, and he, Haley, is the master and husband thereof and duly authorized by said Lubbock, now of San Francisco, to appear and make this claim and defense on his behalf.

The Maria.

On the trial the libellant read the testimony of C. A. Gillingham, Alexander D. McDonald, Frank Tarbell and Allen Francis, of Victoria, taken upon letters rogatory; and that of H. C. Leonard and William Irvine, taken before the Court; also the following documents: A certified copy of the "Memorandum of Association of the British Columbia and Victoria Steam Navigation Co."; and of the entry in the books of the American Consulate at Victoria, concerning the Maria.

The claimant, Fleming, read in evidence a bill of sale of the Maria, dated September 1, 1862, from John T. Wright to himself, and acknowledged at Victoria the day of its date, before Allen Francis, aforesaid; also an *extra-official* certificate from said Allen to said Wright, dated March 21, 1863, wherein the former, for some reason not disclosed, certifies that on July 31, 1862, said Wright consulted with him about the propriety of purchasing the Maria, and that upon inspection of the papers *then* deposited in his office, including "various bills of sale," he advised said Wright, that as the vessel had an American register, and had never been under the British flag, he might purchase her with safety!

The claimant, Lubbock, offered no evidence.

The following facts are satisfactorily proven:

That early in the Frazer river gold excitement, in the summer of 1858, the Maria being a registered American vessel, the property of the claimant Lubbock, was taken to Victoria, to navigate the waters of British Columbia, that the vessel was commanded by Henry Lubbock, a brother of the claimant, William M., who, in the early part of 1859, sold one half of her to Leonard and Green, American citizens of Portland; Ainsworth and Thompson, of the like citizenship and residence, but then at Victoria, being interested in the purchase; that the Maria was run in opposition to the boats of the British corporation aforesaid, under special permits from the colonial authorities, until the close of 1859, or the beginning of 1860, when she was sold by her American owners aforesaid, to the corporation aforesaid, who con-

The Maria.

tinued to own her until sometime between May and August, 1862, when she was transferred to John T. Wright, afore-said, by said corporation, for the purpose of being brought to Portland, to navigate the waters of this district, where she afterwards arrived, and remained until seized as alleged in the libel—said Wright being an American citizen, but then, and now, a resident of Victoria, and a large stockholder in said British corporation.

A point is made on behalf of the claimant, Fleming, that the transfer to the British corporation was conditional, and did not amount to a sale within the purview of Section 16 of the Registry Act.

The facts are, that the Maria was sold and delivered to the corporation for \$20,000. The terms of the sale were, that the corporation was to pay this sum in installments, bearing a certain proportion to the profits of their business. These profits, it was naturally supposed, would be much enhanced by the purchase, and thus the corporation expected to make the payments agreed on. It was also agreed, that if the corporation should fail to make the payments as per contract, that the sellers should have the right to retake the Maria into their possession, and to prevent any depreciation of their security in the meantime, it was provided, that the vessel should not be used by the corporation, until all the purchase money was paid, except an occasional trip, when one of its other boats might be disabled.

Substantially, this is the testimony of Leonard, one of the sellers, and there is nothing in the case that suggests a doubt as to its correctness. The testimony of Irvine is to the same general effect, though being a very unwilling witness for the libellant, he endeavors in his account of the transaction, to make it as mild as possible.

This was a sale by way of trust or confidence at least; the trust and confidence being, that if the corporation should be unable to pay the purchase money, according to the terms of sale, then it would return the vessel to the sailors. To bring a case within the purview of the Act, it is not necessary that the sale should be a beneficial or *bona fide* one, but it

The Maria.

is sufficient if there be "a transmutation of ownership, by way of trust confidence or otherwise." (*The Margaret*, 9 Whea. 424.) In the case just cited, the Supreme Court held that a mere colorable change of ownership or sale, made for the purpose of evading the revenue laws of a foreign country, was a sale within the statute. But if it was a conditional sale, the condition being in substance and effect, that the seller might reclaim the property, upon a failure to pay the purchase money; nevertheless, it was a sale. The property in the vessel in the meantime, was in the corporation, and if she had been destroyed by any casualty, it would have been its loss.

But, in fact, the British corporation paid the purchase money as it agreed to, or as the sellers subsequently agreed to receive it, and the vessel was never retaken by the latter, but remained in the possession of the former. In pursuance of the terms of the sale, the corporation paid the former American owners the sum of \$13,000, when in December, 1861, or January, 1862, Leonard, acting on behalf of the Portland parties, and Gillingham, of the claimant Lubbock, arranged with the corporation to take its notes, endorsed by the witness Irvine, for the sum of \$7,000, the amount then remaining due, and give the latter an absolute bill of sale of the vessel. This arrangement was carried out at once. Leonard and Gillingham executed the bill of sale. The notes were made and delivered, and afterwards duly paid. Here, then; at least, was an absolute and unqualified sale to this foreign corporation.

Counsel for the claimants insist that the government should produce the bill of sale last mentioned; but upon the evidence it is probable, and such is the legal presumption, that this instrument as a muniment of title followed the ownership and possession of the Maria, and that, therefore, it is under the control of the claimants, at least in the case of Fleming, who claims to have purchased since the execution of this bill of sale to the corporation.

Again, it is questioned whether this corporation, "The British Columbia and Victoria Steam Navigation Company,"

The Maria.

can be considered "a subject or citizen of a foreign prince or State."

The evidence proves that the corporation was formed and exists under and by virtue of the laws of the foreign country where it is located and doing business. Without reference to the nationality of the stock or stockholders therein, I am satisfied that the corporation, for the purpose of section 16 of the Registry Act, must be deemed a subject or citizen of the country by authority and permission of whose laws it was created and exists. Manifestly, the omission to make known a sale to such a corporation, is within the mischief intended to be guarded against and prevented by the section.

But even admitting that the individuals who constitute the corporation or association, must be "subjects of a foreign prince or State," to make the latter such, I think there is enough before the Court to warrant the conclusion that this was a sale to such a subject. The "memorandum of association" of the company, contains a list of the stockholders and their places of residence. Fifteen of them—about three fifths of the whole number—appear to be residents of Vancouver's Island, and one of the remainder of Canada. There is direct testimony that some of them are British subjects, and that two or three of the heaviest stockholders are American citizens, though probably they are British subjects by birth, and now so in fact. A sale in a foreign port to a person resident there, particularly if such person be of foreign birth, is sufficient to put the claimant upon the proof that such vendee is a citizen of the United States. But it is not necessary that all these individuals should be subjects of a foreign prince, for if any one of them is, then the sale was thus far and therefore "in part" made to such subject, and within the purview of the Act.

It is claimed by counsel for claimant, that the Maria did not sail under the British flag, and was not registered as a British bottom; and much stress is laid upon these circumstances in considering the question of whether or not there was a sale.

The Maria.

There is no direct testimony upon the subject, but all the circumstances tend to support the conclusion that the vessel was not registered in British Columbia. The fact that she was scarcely if ever used by the corporation while in its possession might account for the non-registry, if it was necessary or material to account for it. The forfeiture is not declared on account of the vessels obtaining a foreign register or not, but because of a failure to make known *a sale to a foreigner*. It makes no difference, then, whether the Maria sailed under the British flag, whatever that may mean, or not, or whether she had a British registry or not. If the alleged sale was doubtful, these circumstances might be evidence upon the question. But a sale, proven as this is beyond a possibility of a doubt, cannot be affected by the mere fact that the vessel did not have a British register.

It appears that soon after the bill of sale to the corporation, and probably as early as May or June, 1862, John T. Wright, formerly of San Francisco, became a large shareholder and active manager in such corporation, and a resident of Victoria. The Maria being still laid up, the question of sending her to Portland began to be mooted in the corporation. It is a matter of general notoriety, that about this time a great impetus was given to steamboating on the waters of the Columbia and Wallamet rivers, by the recent discovery of gold mines to the eastward of the Cascade mountains. It is possible that the prospect of sharing in this rich harvest, or selling the Maria at a high figure to those who were already engaged in the business, was the immediate inducement for the contemplated removal. From all the circumstances, particularly the subsequent developments, it is equally probable that said Wright was the prime mover in this project.

Irvine testifies, that in a conversation about this time with a fellow-stockholder, on the propriety of sending the Maria to Portland to engage in the navigation of the waters of this district, that he objected to her going as the property of the corporation, for fear she would be libeled here—in other words, seized as a foreign bottom engaged in the coasting

The Maria.

trade—saying that if she went at all he wanted her to go as the property of said Wright. Soon after Irvine was informed by the same stockholder, that it had been settled that the Maria should go to Portland as the property of Wright. And this testimony shows who Irvine thought the Maria then belonged to. It is consistent with the fact otherwise abundantly established, that she was and had been the property of the British corporation of which he was a stockholder. This being the case, he was not willing to risk her being sent to Portland as the property of such corporation, but if Wright saw proper to become the owner and take her, well and good.

On July 30, 1862, the Maria arrived at Victoria from New Westminster, under charge of Wright as owner and master, on the way to Portland. At the Consulate at Victoria, Wright produced the register issued to the Maria at San Francisco, and induced Consul Francis to make an entry in the records of his office concerning the Maria in these words: "1862, July 31. Bill of sale to John T. Wright, Jr., from C. A. Gillingham and A. C. Leonard, value \$——." In his testimony, Francis says he made this entry upon information derived from Wright, and that otherwise he knew nothing of such sale to Wright. Both Leonard and Gillingham, disinterested and credible witnesses, testify that they never sold or made any bill of sale of the Maria to Wright.

Wright is deeply interested in the result of this suit, and the whole circumstances excite a strong suspicion, that he is the real claimant, and that Fleming is only put forward because it was thought that he might have some advantage over Wright, by claiming as an innocent purchaser. The bill of sale to Fleming is dated September 1, 1862, but it is doubtful if he was ever in possession of the vessel. Why don't Wright produce the bill of sale from Leonard and Gillingham to himself, which he represented to the Consul to exist in July, 1862? If it is lost or mislaid, why not account for it? He is a competent witness. There is no doubt but that the Consulate entry of July 31, 1862, was

The Maria.

fraudulent and false, and that Wright procured it to be made, to show an apparent title in himself directly from the American owners, and thereby suppress the fact of the intermediate sale to the foreign corporation, and to deceive the collector of this district into receiving and entering the Maria as an American vessel and entitled to a coasting license.

There is no evidence or pretense that any of the sales or transfers made during the three years the Maria remained in British Columbia, were ever reported to the collector at Astoria, or that the American register was ever returned to any American collector, other than as stated at Astoria.

This he done, either by false representations to the Consul or by exhibiting to him a forged bill of sale. His silence, now that he is called upon to explain, justifies the worst conclusion. If he ever owned the Maria at all, he bought her of the corporation. To this conclusion points the testimony of McDonald, who testifies that he knows from the members of the corporation and an inspection of their books, that Wright did so purchase the vessel, and paid for her by giving in exchange $\frac{1}{4}$ of the American steamboat Eliza Anderson, now and then navigating Puget's Sound.

In pursuance of the fraudulent purpose above mentioned, Wright on the same day that he procured the false entry of sale to be made in the records of the Consul's office, procured the Consul, by some means, to make the *extra*-official endorsement upon the American register, to the effect that the Maria was the property of said Wright. Haley, the now professed agent of the claimant Lubbock, was present when this endorsement was made, and on the same day was qualified as master before the Consul, and took command under Wright as owner. He also sailed the Maria to Astoria under this register, and there surrendered it and applied for a coasting license, first entering the vessel as the property of Wright, which involved the necessity of his swearing to that fact. As the law required him to swear to the ownership, it is fair to presume that it was done.

How then is the claim of Lubbock, or rather that of his professed agent, sustained? Waiving the question of forfeit-

The Maria.

ure, he does not appear to have a title of right to the Maria. It is satisfactorily shown that Lubbock sold her long since. He does not appear in person to make this claim, or to testify in support of it, although Haley states that he is of San Francisco—and it is highly probable that he is to-day ignorant that one has been made for him. Even Haley himself does not come forward and testify as a witness in support of the claim.

Fleming shows a paper title from Wright, but offers no evidence to show that Wright ever had any interest in the vessel to transfer to him, except the false entry in the consular records of the bill of sale from Leonard and Gillingham to him. Upon this ground, his claim might be dismissed as unfounded in fact. But I think it sufficiently appears from the evidence of the libellant, that Wright did become the owner of the vessel before her departure from Victoria. As has been said, it is probable that he purchased her from the British corporation, and gave $\frac{1}{10}$ of the Eliza Anderson in exchange. But this fact Fleming dare not avow. He has denied in his answer that the corporation ever purchased or owned any interest in the Maria.

Either Wright purchased from the corporation or he did not. If not, then so far as appears, he never had any interest in the vessel and could not transfer any to Fleming. If he did, then the corporation must have been the owners in some way—"trust, confidence or otherwise"—and the sale by which it became such owner not being made known upon the return of the person in charge of her to an American port, but studiously and fraudulently concealed, she thereby became forfeited under section 16 of the Registry Act, some time before the bill of sale to Fleming. This being so, Wright lost his property in the vessel on August 8, and therefore had none to transfer or convey to Fleming on September 1, 1862.

The law is well established that the forfeiture, unless otherwise provided, attaches to the property at the moment of the commission of the act for which the forfeiture is denounced, and that from that moment the title of the pre-

vious owners is divested. (*Gelston v. Hoyt*, 3 Whea. 311; 1960 Bags of Coffee, 8 Cranch. 398, 417).

It matters not whether Fleming purchased after this in good faith or otherwise. The forfeiture to the United States had occurred, and this proceeding is only for the purpose of establishing that fact by a judicial decree. The doctrine of an innocent purchaser, even if Fleming be one, which is very doubtful, has no application to the case.

The two circumstances which constitute a cause of forfeiture under section 16—a sale to a foreign subject and the neglect to make such sale known as directed by the act, are established. There can be no question on the evidence but that there was a neglect to make this sale known, not only “in the manner hereinbefore directed,” as expressed in such section, but in any manner by any one having charge of or connected with the vessel. But *how* this sale is to be made known is not so clear as might be. The question has not been made in the case, and it is not necessary to particularly consider it. Mr. Justice Story, in *The Margaret* (9 Whea. 422), takes it for granted, that the “hereinbefore directed” of section 16, refers to section 7 of the act, and so far as I have observed, there is no other section of the act to which this clause can refer. Section 7 provides for the giving bond for a register, and one of the conditions of such bond, is that in case of any transfer of the vessel to a foreigner at a foreign port, the “master or person having the charge or command thereof, shall, within eight days of his arrival in any district of the United States, deliver up” the register thereof, “to the collector of such district.” This direction appears to imply that the duty of delivering up the register devolves upon the person in charge or command of the vessel at the time of the transfer. The act intends that such transfer shall separate the vessel and the register. Presuming that the American owners and persons in charge at the time of this sale, to the British corporation returned to a district of the United States, this register should have been delivered up long ago. But, as a matter of fact, it was not returned until the entry of the vessel at Astoria

The Maria.

in August, 1862, and then it was not delivered up with notice of sale, as provided in these sections. I question whether Haley could have made the delivery of the register and given the information of this sale required by the act. Nor do I see my way clear in the absence of evidence to that effect, to presume that the party in charge at the time of this sale has yet returned to any district of the United States, and therefore had an opportunity to cause a forfeiture of the vessel by neglecting to deliver up the register and make known such sale. To show this in the first instance, is, I presume, a part of the libellant's case, though very slight proof may put the burden on the claimant to show the fact that such party is still abroad. True, it appears that Leonard has returned to this district, and it may be that under the circumstances it would be proper to consider him the party in charge of the vessel at the time of the sale, and whose failure to deliver the register and make known the sale upon his return to the United States, caused the forfeiture of the vessel.

It also appears that Ainsworth, another one of the owners at the time of the sale to the British corporation, gave the information upon which this seizure was made, from which it is to be inferred that he had already returned to the district without delivering up the register or making known such sale.

The facts also show a clear case of forfeiture under section 27—the sailing of the Maria from Victoria to Astoria, and her entry at the latter port by the use of this register when the master and owner both well knew that she was not entitled to it, because she had been sold to a foreign subject since it was given, and should have been returned long before. And not only was this misuse of the register knowingly made, but also fraudulently. There must be a decree of condemnation.

As to the claim of Gibson for wages, there is no proof that he was a licensed engineer under the laws of the United States, and therefore he was not qualified to serve in that capacity on the Maria while she was navigating the waters

The Maria.

of this district. This fact is fatal to a recovery for the period that the vessel navigated such waters. After careful consideration this Court held in *The Pioneer** that a pilot or engineer not licensed under the laws of the United States could not recover wages for services on steam vessels navigating the waters of the United States, and carrying passengers. But I see nothing in this fact to prevent the engineer from recovering wages for the time occupied in coming from Victoria to Astoria. This service was not performed upon the waters of the United States, nor on a voyage commencing on them, but on the high seas, and on a voyage from a foreign port. Besides, it may be considered that as the vessel came over in ballast, she was not engaged in carrying passengers, unless being ready and willing to carry passengers, if they offer, is being so engaged.

It is further urged by the District Attorney, that this voyage was an illegal one, and that therefore the vessel is not liable for the wages of any one who contributed to it. But I cannot perceive wherein the voyage was illegal. The use of the registry was illegal, but the engineer is not responsible for that, or even chargeable with notice of the fact. The property in the vessel was already forfeited in fact to the United States, but until the Government asserted its right to the forfeiture, whoever was in possession of her might make any lawful use of her—and for aught that appears a voyage from Victoria to Astoria was such a use.

Nor do I wish to be understood as admitting that a forfeiture of a vessel affects the lien of the crew thereon, unless such forfeiture is caused upon or by the voyage on which such wages are earned; and that, too, by the vessels being employed in some transaction or voyage which is made a crime for any one to aid or participate in, or the unlawful purpose of which is manifest to the commonest understanding.

The voyage from Victoria here was an extraordinary one for a vessel of this class, and I will allow Gibson one month's pay for it, at the rate of \$200 per month.

* *Ante*, 58.

The Maria.

Concerning the claim for money advanced, on the evidence, I have serious doubts as to the fact. It appears quite certain that Gibson loaned Haley \$225, but I think it not unlikely that it was loaned to the latter for his own use, or that some of it was money which Haley lost to Gibson at cards. The proof of the claim rests upon Haley's testimony, and he has shown himself a very unreliable witness throughout this suit. The evidence as to the vessel's necessities is very indefinite. Haley states that between \$70 and \$80 of the sum was paid to Allen and Lewis, on account of freight taken from the steamship Pacific, of San Francisco, and that there was an open account between the vessels. Averaging this item at \$75, it is disallowed. The remainder of the claim—\$150—is allowed. Admitting that it is doubtful if all this sum was ever applied to meet the necessities of the vessel, and without attempting to argue the question of fact involved in its allowance, I remark that it is a hard case. By no fault of Gibson's he has been kept out of the money justly due him by the prolonged pendency of this suit. And even now he will be paid in legal tender notes received upon the sale of the vessel during such pendency at par, when their actual value on this coast is far below it.

Decree, that the vessel is and was forfeited to the United States for the causes alleged in the libel, and that Gibson recover of said vessel the sum of \$350, which sum is ordered to be paid out of the funds in the registry of the Court arising from the sale of the Maria, heretofore made, and that the remainder of such funds, after paying thereout the costs of this suit, be disposed of as by statute is provided.

Edward W. McGraw, for the United States.

Amory Holbrook, for claimant Fleming.

Lafayette Grover, for claimant Lubbock.

David Logan, for Gibson.

John T. Hall v. Isaiah Austin.

DISTRICT COURT, DECEMBER 10, 1864.

JOHN T. HALL v. ISAIAH AUSTIN.

Under the Oregon Code, a defendant in ejectment cannot avail himself of an estate in the premises, in himself or another as a defence, unless the fact is pleaded.

A detailed statement of matters which might be evidence in support of a plea of title in the defendant, is not a proper or sufficient plea of such title, and will be stricken out on motion, as redundant.

An alleged equitable interest or right in the defendant in an action of ejectment, is no defence to such action.

Section 72 of the Oregon Civil Code, which gives the defendant a right to plead as many several defences to an action as he may have, is similar to 4 Anne C. 16, §4, allowing double pleas, and should be similarly construed, so as to permit the defendant to plead inconsistent or contradictory defences to the same action.

DEADY, J. This is an action to recover possession of real property, to wit: lots 5 and 6 in block 38 in the town of Portland.

The complaint alleges that the plaintiff is seized in fee of the premises, and is entitled to the possession thereof. The answer of the defendant, specifically denies the allegations of the complaint, and also contains what purports to be, six other pleas or defences to the action. The plaintiff moves to strike out all but the sixth of the special pleas, because the facts stated therein are irrelevant and redundant.

The first plea substantially states that the premises have been patented by the United States to the corporate authorities of Portland, in trust for the use and benefit of the occupants thereof, under the Act of Congress of May 23, 1844, commonly called the Town Site Law; and that the defendant has been in the possession and occupancy of the premises for two and a half years, and together with those under whom he claims, for fourteen years, and that he claims the premises by virtue of such occupancy and Act of Congress.

The second plea sets forth a series of conveyances of the premises, commencing with a deed from Nathaniel Crosby and Thomas Smith, to Oliver Colbourne, dated November 15, 1850, and ending with one from John Thompson to the

John T. Hall v. Isaiah Austin.

defendant, dated April 11, 1862; and states, substantially, that at the date of the conveyance from Crosby and Smith, to Colbourne, the grantors therein, as the defendant is informed and believed, were the owners in whole or in part, of the premises, or were the agents of the plaintiff, duly authorized to convey the same, and thereby did convey all the right and interest of the plaintiff in the premises, as well as that of Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman, the three proprietors of the Portland land claim.

The third plea is the same in effect as the second one, except that it alleges that said Crosby and Smith, at the date of their deed to Colbourne, possessed all the right and title that said Lownsdale, Coffin and Chapman at any time had in the premises.

The fourth plea does not differ from the third, except that it alleges that on November 15, 1850, said Crosby and Smith had and possessed an undivided one half of the premises with the proprietors aforesaid.

The fifth plea is like the fourth, except that it alleges that Crosby and Smith were the agents of the plaintiff, and authorized by him to make the deed aforesaid, to Colbourne.

Under the Code (Or. Code, 226), a defendant in ejectment, cannot give in evidence any estate in himself or another, in the property in controversy, unless the same is pleaded in his answer, stating therein the nature and duration of the estate. At common law, the plea in this action was simply not guilty, under which the defendant might not only controvert the plaintiff's alleged right directly, but might also prove an estate in the premises in himself, or a third person, except where he, or those under whom he claimed, entered under the plaintiff.

The first plea in the answer which contains a specific denial of the allegations of the complaint, is equivalent to the plea of not guilty at common law, and puts the plaintiff upon the proof of his title and right of possession. If the defendant desires to make a further affirmative defence of an estate in himself, or a third person, he must plead the

fact specially, and state in the plea whether such estate is in fee, for life, or for a term of years.

A mere statement in detail of facts and transactions, which tend to show that the defendant had any such estate in the premises, is not a good or sufficient pleading. Instead of pleading an estate in the party, it is a setting forth the evidence of title—an attempt to convert the action at law into a suit in equity. The plea should simply state that the defendant has an estate in the premises, either in fee, for life, or for years, and if either of the latter two, for whose life, or what term of years, as the case may be. In pleading, an estate in fee, it was never necessary at law, to do more than to aver the fact, but in case of a lesser estate, the rule required that in all pleadings subsequent to the declaration, its commencement and mode of derivation should be especially stated (Gould's Plead. 60). The Code expressly requires that the answer of the defendant, when it contains a plea of a *particular* estate in himself, should state for whose life, or what term of years such estate is held.

The motion to strike out must prevail. Tried by these rules, these pleas are objectionable as being either impertinent or redundant. It is not alleged in any of them that the defendant is seized or possessed of any estate in the premises. One and all, they are simply a *prolix story* of buyings and sellings, or other transactions, with the conclusion that the defendant thereby acquired either all or half the interest of the plaintiff, or all the interest of the three alleged town proprietors on November 16, 1850, whatever that may be or have been.

Whatever effect the matters contained in these pleas might have as evidence, they are not proper to be stated in a plea or answer. To avail himself of the defence of an estate in the premises in himself, the defendant must plead the fact directly and positively, and the statement of a series of transactions or circumstances, from which the same is sought to be inferred, is not sufficient.

As to the plea founded upon the Town Site Law, it is not necessary now to consider the question of whether such law was

 John T. Hall v. Isaiah Austin.

in force in Oregon before July 17, 1854, when it was specially extended here by act of that date (10 Stat. 305). *Admitting that the law was in force since the date of the Organic Act, August 14, 1848—the plea is still liable to the objection of redundancy, being a mere detailed statement, of what is supposed to be sufficient evidence of title or estate in the defendant under that act.

Neither is it clear from these pleas what kind of an interest the defendant claims in the premises. It is not alleged in any of them, either in terms or effect, that he has any legal interest in the lots in controversy, and from the argument it appears that if he has any interest it is some kind of an equitable one. In this action the plaintiff claims to have the legal estate in the premises, and an equitable interest or a right in equity to have the legal estate is no defence thereto. In such a case the defendant's remedy is in equity, and his alleged right cannot be determined at law.

A question has been made in the argument, whether under the Code, a defendant could plead inconsistent or contradictory defences in the same answer.

At common law a defendant could plead but one defence to an action. But this rule operating hardly in some instances, led to the enactment of 4 Anne, C. 16, § 4, which allowed the defendant by leave of the Court, "to plead *as many several matters* to an action as he might think necessary for his defence." Under the construction given to this statute, each plea was to be considered and have effect as if it were pleaded alone. In the language of Lord Ch. J. Willis, one plea "cannot be taken in to *help* or *destroy* another," but that "every plea must stand or fall by *itself*."

With this statute of Anne and this construction of it the Code agrees (Or. Code, 157). It provides that "the defendant may set forth by answer as many defences *

* * as he may have. They shall each be separately stated and refer to the causes of action which they are intended to answer, in such a manner that they may be intel-

* *Lounsedale v. The City of Portland*, Ante, 1.

Cullen C. Chapman v. School District No. 1, and others.

ligibly distinguished." A *defence* under the Code separately stated, is nothing more or less than a plea at common law, and "must stand or fall by itself."

While upon this subject it may be proper to notice that some of the allegations in these pleas are made upon information and belief. This form of allegation is not authorized by the Code, and to say the least, only makes the pleadings unnecessarily prolix. The allegation must not be upon hearsay. The verification makes no distinction between the allegations of a pleading—it being to the effect that the party *believes the pleading to be true*. (Or. Code, 156, 158.)

Order that the motion to strike out be allowed, with costs.

W. W. Page, for plaintiff.

Aaron E. Wait, for defendant.

CIRCUIT COURT, JANUARY 9, 1865.

CULLEN C. CHAPMAN v. SCHOOL DISTRICT No. 1,
THE CITY OF PORTLAND AND BENJAMIN STARK.

Exceptions to an answer in equity for impertinence are only allowed where it is apparent that the matter excepted to, is not material or relevant, or is stated with needless prolixity.

An allegation in an answer, however evasive or insufficient, which is responsive to the bill, is not liable to exception for impertinence.

The act of May 23, 1844 (5 Stat. 657), commonly called the Town Site Law was not in force in Oregon prior to the passage of the act of July 14, 1854 (10 Stat. 305), and an entry and patent in pursuance of it, to land settled upon prior to that time under the Donation Act of September 27, 1850 (9 Stat. 496), is simply void.

The Donation Act was the first law of Congress affecting the public lands in Oregon, and it is a grant in the present and gives the fee simple to the donor thereunder from the date of his settlement; but, until the complete performance of the conditions subsequent to such settlement, the estate granted is a base or conditional fee and liable to be defeated and revert to the donor by a failure to perform such conditions.

Cullen C. Chapman v. School District No. 1, and others.

A defendant in a suit in equity cannot by means of his answer, obtain any relief concerning the subject matter of the suit, and a prayer therefor in such answer is impertinent.

Matter in abatement of a suit in equity cannot be alleged by way of answer, but must be set up in a plea.

The right of the settler under the Donation Act to the land claimed by him, ultimately depends upon the settlement and the performance of the subsequent conditions of residence, cultivation, and proof.

The patent to the settler is conclusive evidence of the performance of such conditions in a Court of law and primary in a Court of equity; but such patent cannot limit or restrain the estate granted by the act, which vests in the donor independently of and prior to the issuing thereof.

An exception^f for impertinence must be allowed in whole or not at all.

DEADY, J. This is a suit in equity to quiet title to real property, and was commenced October 22, 1864. The complainant alleges for cause of suit against these defendants, that he is seized in fee simple of the undivided one fourth part of lot 3, in block 29 of the town of Portland, in the district of Oregon—the defendant Stark being seized in fee simple of the other three fourths of said lot. That the defendants—School District No. 1, and the City of Portland—wrongfully claim and pretend to have an interest or estate in the premises, adverse to the complainant and the defendant Stark, and that such claim impairs the value of the plaintiff's estate in the premises, in the market, and prays a decree of the Court to quiet his title, etc.

The defendants—School District No. 1 and the city of Portland—were duly served with process, and appeared and answered the bill—the latter on December 5, 1864. The defendant Stark has not been served or appeared in the suit.

To the answer of the city of Portland, the complainant excepts for impertinence. The exceptions are eleven in number and include all the answer, except so much of it as is in direct response to the allegations of the bill, and also the exhibits A, B, C and D. Exceptions for impertinence are only allowed when it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. If it *may* be material, the exception will not be allowed, as that would leave the defendant without remedy, but the allegations excepted to, will be allowed to remain in

the answer, and the effect thereof, if found to be true, determined on the final hearing.

The first exception is taken to that portion of the answer which alleges the occupancy of the Portland land claim, including the premises in dispute, by Daniel H. Lownsdale and Stephen Coffin, on and prior to November 26, 1849, and until about December 13, 1849, when W. W. Chapman was admitted into the possession, jointly with said Lownsdale and Coffin; and that during the period of their possession these occupants laid off and sold blocks and lots upon said land claim, with the avowed intention of obtaining title from the United States, and making to the purchasers of such blocks and lots sufficient deeds therefor.

This allegation standing by itself would be clearly impertinent, as it nowhere appears by the answer that either Lownsdale, Coffin or Chapman, ever had or now have any legal or equitable interest in the premises. They had the bare, naked possession before the passage of the Donation Law, but subsequently parted with it, before the passage of that act. But this allegation is proper matter of inducement to the matter contained in the two following exceptions, and will depend upon the disposition made of them.

The second exception is taken to that portion of the answer which alleges the execution of a bond for a deed to the premises in controversy, by Lownsdale and Coffin, on November 26, 1849, to the citizens of Portland, or some association thereof, to be thereafter organized; that the conditions of the bond have been performed by such citizens, and that they have ever since remained in possession thereof. Standing alone, the matter contained in this exception would be impertinent, for the reasons applicable to the first exception—the want of interest in the premises by either of the obligors in the bond, Lownsdale and Coffin. But this is also proper matter of inducement to what follows in the next exception, and may be passed over until that is considered.

The third exception is taken to that portion of the answer which alleges, that Daniel H. Lownsdale being in San Fran-

Cullen C. Chapman v. School District No. 1, and others.

cisco, on the first of March, 1850, there entered into an agreement with the defendant Benjamin Stark, by which he released to said Stark the possession of a portion of said Portland land claim, including the premises in controversy, which agreement was ratified by the co-occupants of Lownsdale, namely, Coffin and Chapman, on April 13, 1850, and that the defendant Stark, by the terms of said agreement and for a valuable consideration, bound himself to ratify and confirm all sales and conveyances of blocks and lots, including by name and special description the premises in controversy, in the part of said claim to him released, and made prior to the date thereof; and that said Stark subsequently occupied said land with the avowed intention of obtaining title from the United States, and ratifying and confirming the prior sales therein, as in said agreement specified, and that during this time and up to the time Stark obtained a patent from the United States for such land, the citizens of Portland were in the possession of the premises in controversy and made valuable improvements thereon, with the assent of said Stark.

This exception is not allowed, and therefore neither the first or the second ones. Several important questions arise upon the allegations, which will be reserved for the final hearing, and determined by the final decree. This ruling only goes so far as to decide that I do not deem this matter clearly immaterial or irrelevant.

The fourth exception is taken to that portion of the answer which alleges that Stark claims to be the owner in fee of an undivided three fourths of the lot in question, by virtue of a patent to him from the United States, dated December 8, 1860, and that the complainant claims by virtue of some conveyance from Stark.

This exception will be disallowed. I do not think the matter immaterial. It is some kind of an admission or statement of the right of the complainant and his co-tenant, Stark. It is true it is made in an evasive manner, not being a direct averment or admission, made by the defendant as he asserts or admits the fact to be, but only the defendant's

Cullen C. Chapman v. School District No. 1, and others.

statement of what Stark and the complainant claim. For this reason it may be insufficient, but not impertinent.

The fifth exception is taken to that portion of the answer, which alleges that the conveyance from Stark to the complainant, is without consideration and sham, and that the complainant, at and before the execution thereof, had notice of this defendant's equities as before stated.

This exception will be disallowed. So far, the answer of the defendant is substantially that it has the equitable estate in the premises—at least I suppose this is the conclusion which the defendant will seek to deduce and maintain from the allegations embraced in the exceptions already passed upon and disallowed. In this view of the case it is material for the defendant to aver and show, that the complainants received the conveyance from Stark, the owner of the legal title, without consideration or at least with notice of the defendant's prior equity.

The sixth exception is taken to that portion of the answer, which alleges the occupancy of the Portland land claim at, prior, and since September 1, 1844, as a town site by divers people, citizens of the United States, and otherwise; that the city of Portland was incorporated on January 23, 1851, and that on February 1, 1858, the corporate authorities of said city, caused an entry to be made in the proper land office, of 307 $\frac{49}{100}$ acres of the Portland land claim and town site, including the lot in question; and that in pursuance of said entry on December 7, 1860, a patent issued to said city for said lands from the United States, and for the use and benefit of the occupants thereof.

This portion of the answer is based upon the assumption, that the law of Congress, of May 23, 1844, and commonly called the Town Site Law, was in force in Oregon prior to the time it was specially extended here, by act of July 14, 1854. In *Lownsdale v. The City of Portland*, I had occasion to pass upon this question. Time and reflection have only confirmed in my mind, the correctness of the conclusions arrived at in that case.

The Donation Law of September 27, 1850, was the first

Cullen C. Chapman v. School District No. 1, and others.

and only law affecting the right to or interest in public lands in Oregon, until the special extension of the Town Site Law to this country. This entry by the city, and patent to it in pursuance thereof, being without color of law or authority, are simply void, and no right to the premises in controversy can be upheld by them. Although the Town Site Law was in force in Oregon in the years 1858-60, when these proceedings took place, no land could be appropriated under it, for the benefit of occupants of town sites, which had already been granted to others by the terms and conditions of the Donation Law. The Donation Law is a grant in the present, and gives the fee simple to every settler who avails himself of its provisions from the date of his settlement. (*Lessieur et al. v. Price*, 12 How. 76; 11 Opin., 29.) True, until the completion of the subsequent conditions of residence and cultivation and proof thereof, it is an estate upon condition—what is known at common law as a base or conditional fee, subject to be defeated or lost by a failure to perform the conditions upon which it is held. But it is an estate in fee nevertheless, and upon the completion of the residence and cultivation or other conditions, it becomes absolute and unqualified. Such was the grant to Stark and other settlers under the Donation Act, and proceedings under the Town Site Law could not affect the right to lands settled under the Donation Act prior to that time. Whether a corporation like the city of Portland or any corporation, could hold as an *occupant* under the Town Site Law, is very questionable, but not necessary to decide. This exception is allowed.

The seventh exception is taken to that portion of the answer which alleges that on November 4, 1857, Daniel H. Lownsdale and his assignees, Thomas Carter and Joseph S. Smith, conveyed the lot in question to J. T. Holmes and Wm. L. McEwan, and that on November 19, 1857, Wm. M. King, *assuming* to act for the subscribers to the building on said lot, made a conveyance thereof to said Holmes and McEwan, and that under these conveyances these grantees took possession of the lot and held the same adversely to

Cullen C. Chapman v. School District No. 1, and others.

the city, at the time the patent was issued under the Town Site Law; and that sometime in 1860, Holmes conveyed an undivided half of the lot to the city of Portland.

This exception is allowed. As neither Lownsdale, Carter or Smith, are shown or averred to have had any interest in the premises, either legal or equitable, Holmes and McEwan took nothing by their conveyance to them; and consequently Holmes had no interest to convey to the city, and conveyed none. The allegation concerning the deed from King, is that he assumed to act as agent for the subscribers to the building. He might as well assume to act for anybody else. No authority is shown, nor is any averred; nor does it appear how these subscribers themselves could convey property to the city of Portland, which the defendant claims they or other citizens of Portland received for certain public uses and trusts, and none other. If the city of Portland is the legal successor of the persons to whom this property was sold, dedicated or covenanted to be conveyed, as alleged by the defendant, then this King deed could, at best, be only a conveyance from itself to itself; and if it was not such successor, then it does not appear how it could become so by force of a conveyance, executed by an *assumed* agent of some particular persons who are not shown or averred to have had any authority to convey themselves.

The eighth exception is taken to that portion of the answer, which alleges that the patent to Stark purports to be based upon certificate No. 69, and that said Stark falsely and fraudulently procured the proof to be made to the Surveyor General of the residence and cultivation in such certificate mentioned, and that said Stark never did perform the residence and cultivation aforesaid; and that there is a reservation in the patent to Stark in favor of the rights of occupants of town lots under the city of Portland, and Stark occupied said patent with the avowed purpose of confirming the seizin of the occupants of such lots.

Before proceeding to consider this exception, I will state the ninth one, and consider them together. The ninth exception is taken to the prayer of the answer, and to that por-

Cullen C. Chapman v. School District No. 1, and others.

tion of it which alleges that Stark refuses to ratify and confirm the rights of the defendant to the lot in question, but brings this suit to defraud the defendant in this particular; and that in pursuance of such purpose, he caused a conveyance to be made to some real or fictitious person, the complainant in this suit. That said certificate 69 and patent in pursuance thereof are fraudulent and void as against this defendant, with a prayer that said patent to Stark and conveyance from the latter to the complainant, may be set aside and held for nought, and that said complainant and defendants, School District No. 1 and Stark, be compelled to release to the city of Portland all right and title to the lot in question, and be forever restrained from setting up any right to the said lot by means of the premises, and for such other relief, etc.

It will be noticed that so much of the answer as is contained in these two exceptions, is in direct contradiction and inconsistent with that portion of the answer to which the exceptions have been disallowed. The former assume at least that the legal title is in Stark, but that the equitable estate is in the defendants, by virtue of certain contracts and agreements binding upon Stark. But the parts of the answer now under consideration, allege in effect, that Stark has no title, and that his certificate and patent are void, and should be so declared, because procured by fraud. Thus the defendant seeks to impugn the validity of the very source from which it seeks to derive its own alleged interest.

But waiving this matter, it is plain that these exceptions must be allowed. The function of an answer is to make a defence to the case made in the complaint. A defendant by means of an answer cannot become a complainant and seek affirmative relief, either against the complainant or his co-defendants. The complainant in this suit alleges his legal title to the lot in question, and avers that the defendant, the city of Portland, pretends to have some estate or interest therein, and prays, that the defendant may answer in respect to this, and that the Court would decree against such pretended estate or interest of the defendant. The defendant

Cullen C. Chapman v. School District No. 1, and others.

may answer and disclaim any interest or claim of interest in the premises, and that is the end of the suit; or, it may answer and set forth what estate or interest it has or claims to have in the premises, and upon the final hearing, the Court must determine and decree concerning the nature and validity of such estate or interest. But by means of such answer the defendant cannot become a complainant and seek affirmative relief, as a specific performance of an agreement to convey, or a decree cancelling the patent of the defendant Stark, for fraud or mistake in procuring or issuing it, or a decree cancelling the conveyance of the defendant Stark to the complainant, or affirmative relief against a co-defendant, as a decree against such defendant restraining it from claiming any interest in the premises in question. Further, in the matter contained in the ninth exception, there is an allegation that the complainant is a "real or fictitious person." If this alternative allegation is allowed to have any effect, it amounts to an attempt to plead by way of answer in abatement of the suit, that the complainant is a fictitious person. Matter in abatement of the suit, as that the plaintiff is not a citizen of another State, or that there is no such person, as the alleged complainant, must be alleged by way of plea, and not answer. (Equity rule 39.) The allegation concerning the reservation in Stark's patent, in favor of persons, occupants under the Town Site Law, is of no more force in law than the patent to the city for the use of such occupants. Like the latter, being without authority of law, it is void. Ultimately the right to land under the Donation Law, depends upon the settlement and the performance of the subsequent conditions; of this performance the patent is conclusive evidence in a Court of law, and primary in a Court of equity. But the patent cannot limit or restrain the estate granted by the law, and which vests in the donee independent of the patent.

The tenth exception is to the exhibit A, and is disallowed of course, the allegation referring to it having been allowed to remain in the answer.

The eleventh exception is to the exhibits B, C and D.

Cullen C. Chapman v. School District No. 1, and others.

The exception to exhibit B is not allowed because it is a necessary part of the allegation referring to it, which has been allowed to remain, at least a large portion of it is so necessary and the exception must be allowed in toto, or not at all. The exhibit C, is the patent to Stark, and is referred to in the allegations embraced in the fourth exception. This exception is disallowed, but the matter excepted to, is simply an evasive admission of Stark's interest or estate in the premises in controversy, by virtue of the patent to him of December 8, 1860. In this connection and for all the purposes of the allegation, this reference to the patent is sufficient, and the exhibit is impertinent, and a needless addition to the bulk of the answer. This exception is allowed. The exhibit D is the certificate 69, upon which it is alleged the patent issued. The exception to the allegation referring to this exhibit has been allowed, and the exception to the exhibit is allowed also, of course. The exhibits B, C and D, being separate and distinct, I have treated the exception to them (No. 11), as a separate exception to each exhibit, and disallowed the one to B, and allowed the other two. This is necessary, as an exception for impertinence must be allowed in whole or not at all. In form, the exception is entire, but substantially it is separable into the number of exhibits excepted to.

Order that the exceptions to the answer of the defendant, the city of Portland, numbered one, two, three, four and five be disallowed at the costs of the complainant, and that such exceptions, numbered six, seven, eight, nine and ten be allowed at the costs of the defendant, and that exception number eleven as to the exhibit B, be disallowed at the costs of the complainant, and as to the exhibits C and D, that it be allowed at the costs of defendant.

William W. Page, for complainant.

Joseph N. Dolph, for city of Portland.

Lansing Stout, for School District No. 1.

In re George Bryant, on Habeas Corpus.

DISTRICT COURT, JULY 8, 1865.

IN RE GEORGE BRYANT, ON HABEAS CORPUS.

The term *State*, as used in section 1 of the act for the government of seamen in the merchant service (1 Stat. 131), includes a territory of the United States.

The agent of the master in shipping a crew cannot also act as the agent of a seaman and sign his name to the shipping articles, and in such case the seaman is not liable to be arrested for desertion, under section 7 of the act aforesaid.

Seem, that a seaman is liable for desertion under section 7 aforesaid, who has signed a contract for a voyage containing the particulars specified in section 1 of the act aforesaid, although such voyage is not undertaken to a foreign port nor in a vessel of fifty tons burthen, and to a port in a State other than an adjoining one from the port of departure.

DEADY, J. By authority of a commitment issued by a justice of the peace within this district, the petitioner, George Bryant, was, on July 15, committed to the jail of Multnomah county, as a deserter from the barkentine William Scranton, to be there confined until July 17, and then delivered to the master of said vessel, to proceed upon the voyage. The vessel sailed from San Francisco to a port or ports on the Columbia river, and thence back to the port of departure. The petitioner left the vessel at Portland and sued for his wages, whereupon the commitment aforesaid was procured by the master. Petitioner then sued out this writ of habeas corpus, which was served upon the jailer of Multnomah county jail. In obedience thereto the jailer has produced the body of the petitioner, and for answer thereto states, that he restrains him by authority of the commitment aforesaid, annexing thereto a copy of the same. The matter was then heard and taken under advisement until to-day.

Section 7 of the act of July 20, 1790 (1 Stat. 134), substantially provides that "If any seaman or mariner, who shall have signed a contract to perform a voyage, shall * * * desert * * * such ship or vessel, it shall be lawful for any justice of the peace, * * *

In re George Bryant, on Habeas Corpus.

upon the complaint of the master to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear by due proof that *he has signed a contract* within the intent and meaning of this act," and that such contract has not been discharged or dissolved, and "that such seaman or mariner has deserted the ship or vessel, * * * the said justice shall commit him to the * * common jail of the city," etc.

The *contract* referred to as being "within the intent and meaning" of the act, is prescribed by section 1 thereof, which substantially provides, that: "Every master * * * of a vessel bound from a port in the United States to any foreign port, or of any * * vessel of the burthen of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner, on board such * * vessel, * * * declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped." (1 Stat. 131.)

To authorize the arrest and confinement of a seaman for desertion under this act, he must have "signed a contract" for the voyage "within the intent and meaning" of section 1. What is such a contract? Must it necessarily be a contract for a voyage to a foreign port, or in a vessel of fifty tons burthen to a port in a State of the United States, other than an adjoining State, or is it sufficient if a contract be made between the master and seaman in print or writing as in such section prescribed without reference to the outward terminus of the voyage or the burthen of the vessel. It would seem from the language of section 7, as well as the reason of the thing, that a seaman who has become bound to perform *any lawful voyage*, by a contract executed in the manner and containing the particulars prescribed in section 1, ought to be liable to arrest for desertion as well in one instance as another. But as I think this case can be decided without definitely passing upon this question, I leave it with this suggestion.

In re George Bryant, on Habeas Corpus.

The voyage described in the contract or shipping articles is from San Francisco to a port or ports on the Columbia river and thence back to the port of departure. The Court takes judicial knowledge of the geographical and political divisions of the country, and is therefore aware that a vessel bound to ports on the Columbia river, may be bound to ports in the territory of Washington as well as Oregon—such river being a common boundary between those two political divisions of this country. The territory does not adjoin California, being separated from it by Oregon, and a voyage from a port in California to a port in Washington is so far within the provision in section 1 of the act. But is Washington a “State” within the meaning of the act? I think it is. It is an organized political society existing in pursuance of the supreme law of the land, and upon and within a defined political division of the Republic, and therefore a State within the meaning of that term as used by writers on general law. There is nothing in the act or the reason of it, which indicates that the term is used therein in any narrow or special sense. Its object is to provide for the rights of seamen on voyages which, from their termination at a foreign port, or at a comparatively distant though domestic one, are deemed of sufficient importance to require the security of a written contract. In this connection the primary use of the word “State” appears to be to fix or give the proximate limits beyond which if a voyage is undertaken by a vessel of fifty tons burthen, the contract with the seaman *must* be in writing and specify the voyage or time for which he ships.

The termini or chief ports of the voyage must be places situated in different States other than adjoining ones, or else section 1 of the act does not apply. From this fact, it is manifest that it is the actual or supposed *distance* of such a voyage, physically and conventionally considered, which led to the enactment of section 1, rather than the fact of its being made between two political societies or States which are members of the Union. If the contract was required to be in writing because of the voyage being undertaken

In re George Bryant, on Habeas Corpus.

between *States as such*, a voyage between adjoining states would be within the reason of the act, and therefore not, as now, excluded from its operation.

For these reasons it appears to me that the term "State" is used in the act rather as a geographical expression than a political one, and that the territory of Washington, being not only a distinct political society, but also a country with defined and recognized geographical extent and limits, is a "State" within the meaning and intent of the act.*

I am aware that in *Hepburn et al. v. Ellzey* (2 Cranch, 445), Ch. J. Marshall held, that the word "State" as used in the Judiciary Act, giving jurisdiction to the Circuit Courts in cases between a citizen of the State when the suit is brought, and a citizen of another State was limited to the sense in which the term was used in the constitution, and did not apply to any political society except a member of the Union, and therefore did not include the District of Columbia. But I do not think the cases parallel. Considering this voyage as having been undertaken between ports of different but not adjoining States, and therefore within the power of section 1, it follows that a properly articulated seaman of the vessel is liable under section 7, to be arrested for desertion and returned to the ship. The case is then narrowed down to the question, whether the petitioner "signed the contract" for the voyage.

He testifies that he did not sign the shipping articles nor any one for him with his knowledge or consent, and that he never saw them until he saw them here in Court, that he never went to sea before, and that he went on board the *Scranton* in pursuance of an arrangement with the master, to do the best he could as cook.

The master, William Cathcart, testifies that William Fullard of San Francisco, was employed by him to ship a crew for the voyage, and while on May 23, 1865, he was standing in the door of Fullard's office, the petitioner came to him and asked to ship as cook with him; that he referred

* *The Panama, Ante*, 27.

In re George Bryant, on Habeas Corpus.

him to Fullard who was inside with the articles on his desk, when petitioner walked in and the witness walked away; that on next day he found the petitioner on board at duty, and when he received the articles from Fullard, the petitioner's name was written at the foot of the agreement, opposite the words: "May 23, cook, \$40 per month," and witnessed by Fullard.

The shipping articles were introduced in evidence. Several of the crew who sign them do so by making their mark, but the *name* of the petitioner is subscribed. He testifies that he can neither read or write. His signature appears to be in the same handwriting as that of Fullard's, and it is admitted by the master that such is the fact.

Several objections are made to the shipping articles by counsel for the petitioner—that they lack the certificate of the collector; are not accompanied by a descriptive list of the crew, verified by the master; and that there is no memorandum endorsed upon them of the time when the crew came on board. Except the memorandum, these matters are only required in case of a foreign voyage, and as to it, the contract of hiring may exist independent of it. A neglect to make such memorandum does not vitiate the shipping articles, but in a suit for wages, might authorize the Court to allow the seaman's pay to commence from the date of signing them.

The articles are presumed to be true, but this presumption is disputable, and may be overcome by parol evidence. It appears that a *stranger* may in the presence of a party and by his request, sign his name to a deed, and that such signing is to be deemed the act of the party himself. (2 Green. Ev. §295.) Here there is no direct evidence that the petitioner consented to Fullard's subscribing his name to the articles. He denies all such consent or even knowledge of it. But if I thought it proper for Fullard to sign the petitioner's name to the articles, I would be slow to allow the testimony of an interested witness like the petitioner, to overcome the presumption that the articles are true.

But I do not think the shipping master, who is the agent of

The United States v. Alexander Dodge.

the master and the ship should be allowed to subscribe the seaman's name to the shipping articles—to sign the contract for him. His interest is not that of the seaman's but the vessel's; and for every person he gets upon the articles and aboard ship, he is paid. These purveyors of crews for vessels have strong temptations to overreach the improvident and ignorant people with whom they deal. If they could sign articles for a seaman, and then put him upon the proof in another port that he did not authorize or consent to such signing, they might bind him to a voyage that was never mentioned at the time. A person ought not to act as agent for both parties in making a contract, particularly where one of these parties is a common seaman and the other is the master of a vessel, and such person is in the pay of the latter exclusively.

For these reasons, I conclude that the petitioner did not in fact or law sign this contract, and therefore cannot be arrested for desertion. It follows that the imprisonment is without authority of law and wrongful.

Judgment that the petitioner be discharged from imprisonment or restraint by virtue of the commitment aforesaid; and on account of the matters and things in the answer herein alleged.

W. W. Page and *W. F. Trimble*, for petitioner,

Andrew J. Lawrence, for respondent.

The United States v. Alexander Dodge.

DISTRICT COURT, JULY 15, 1865.

THE UNITED STATES v. ALEXANDER DODGE.

The importer or consignee of imported goods, is personally liable for the duties charged thereon.

An importation is complete when the goods arrive at the proper port of entry, and the duties accrue at that time, and not at the time of the subsequent entry at the custom house.

In 1864 there was no public stores or bonded warehouse in the district of Oregon, and therefore goods imported into such districts, before June 30 of that year, could not come within the description or operation of section 19 of the act of that date (13 Stat. 216.*)

This action was commenced June 23, 1865, to recover a balance of \$738.68, alleged to be due from the defendant to the plaintiff, for duties on a cargo of salt imported from the Sandwich Islands to Portland, in the district of Oregon, in the month of June, 1864. The case was tried by the Court without the intervention of a jury. From the findings it appears:

That on June 12, 1864, the bark Cambridge arrived at the port of Astoria, in this district, from the Sandwich Islands, with a cargo of 401,364 pounds of salt in bulk, consigned to order; that prior to June 30, the defendant purchased said salt, and became the owner and consignee thereof, and as such made a verbal entry of the same for consumption, which entry was to be made in writing, as soon as the salt was discharged from the vessel, and the exact quantity ascertained; that in pursuance of said purchase and verbal entry, and prior to June 30, said salt was, by permission of the proper officer, discharged from said vessel, and received by the defendant in his premises; and that, afterwards, on July 23, the entry of the salt was made and verified in writing by the defendant, and the duties thereon computed, at the rate of twenty-seven cents a hundred pounds, amounting in the aggregate, to \$1,083.68, of which sum the defendant shortly afterwards paid to the collector, \$300, but thereafter refused to pay the remainder of \$783.68.

* Affirmed on error in the Circuit Court, September 13, 1866.—Field, J.

DEADY J. There is no doubt but that the defendant is personally liable for whatever duties are legally due upon the salt. When he purchased a cargo consigned to order, he became the consignee thereof. In *Meredeth v. The United States* (13 Pet. 493), the Supreme Court held that both the importer and consignee were personally liable for duties on imported goods.

Upon the argument no serious question was made as to the facts of this case, but admitting them to be as found by the Court, the defendant makes two objections to the plaintiff's right to recover more than the sum of \$422.45, which he admits to be due. *First*: That under the act of June 30, 1864 (13 Stat. 213), salt was only liable to pay a duty of eighteen cents a hundred pounds, and that this cargo came within that act by virtue of section 19 thereof (13 Stat. 216), which provides: "That all goods, wares and merchandise which may be in the public stores or bonded warehouses on the day and year this act shall take effect shall be subjected to no other duty upon the entry thereof for consumption, than if the same were imported respectively after that day."

In support of this conclusion counsel attempt to maintain that the salt after its discharge from the Cambridge and prior to July 23, was in a "public store," and not yet entered for consumption. The material fact assumed in this proposition is not true. There is not now nor never was any public stores or bonded warehouses for the storing of imported goods established in Portland. The salt was delivered from the vessel on to the private premises of the defendant. At the time it is apparent that he had no thought of such a thing as the salt being entered in bond or deposited in a public store or warehouse. The duties being more than the defendant was prepared to pay at once, the collector, as a favor, trusted the defendant until he could dispose of some portion of the salt. Upon this arrangement he paid the \$300, but hearing soon after of this provision in the act of June 30, 1864, he appears to have conceived the idea of claiming that this importation came within section 19 of said act,

because the salt was in fact stored in a warehouse (his own) when the act took effect, and because the formal entry for consumption was not made until after that date. If there had been a bonded warehouse in Portland, as there should have been, it is more than likely that this salt would have been entered in bond, and thus brought within the operation of said section 19, and thereby been admitted to consumption at one third less duties than it was. For this reason, it may be said that the defendant was within the equity of the statute, and if he had promptly paid the duties according to the collector's assessment and his agreement, and then appealed to the secretary of the treasury in the mode prescribed by law, the difference might have been remitted to him. But as it was, the defendant not only refused to perform his agreement with the collector, but seemed disposed to avoid the payment of even the \$422.45 which he now admits was due from him in any event.

Second: That the importation was not complete until the formal written entry of the goods for consumption on July 23, and that therefore the duties thereon are to be computed under the act then in force. But the reason of the thing and the whole current of authorities are otherwise.

Duties accrue when the vessel containing the goods arrives at the proper port of entry. This is the moment when the importation is complete, and not the subsequent entry at the custom house. This is the long and well established rule even in cases like this, where a new act has been passed increasing or diminishing duties upon goods imported after a specified period. (*Meredeth v. The U. S.*, cited above; *The U. S. v. Howell*, 5 Cr. 372; *Arnold v. The U. S.*, 9 Cr. 120; *The U. S. v. Lindsey, et al.*, 1 Gall. 366; *Prince v. The U. S.*, 2 Gall. 208.)

Judgment that the plaintiff recover off the defendant, \$783.68, with interest thereon at the rate of ten per centum per annum, from July 23, 1864, amounting to \$76.19, together with its costs and disbursements of this action, taxed at \$70.72.

Joseph N. Dolph, for the plaintiff.

Lansing Stout and Charles Larabee, for defendant.

The United States v. Jacob Mayer.

DISTRICT COURT, NOVEMBER 10, 1865.

THE UNITED STATES v. JACOB MAYER.

Upon an indictment for perjury, an affidavit of the defendant's directly contradicting the one upon which the perjury is assigned, is not sufficient evidence of the falsity of the latter.

Under the Internal Revenue Act of June 30, 1864 (13 Stat. 239), a merchant in making his statement of income, is entitled to deduct from his gross profits the bad debts made during the year to which the statement relates, or such as appear to be bad at the end of the year.

The falsity of the oath upon which perjury is assigned may be shown by the books and papers of the defendant, kept under his control and subject to his inspection.

Effect to be given to the testimony of hostile or friendly witnesses.

Evidence of good character, effect of, upon trial of a criminal charge. .

This was an indictment for perjury, alleged to have been committed by the defendant in swearing to his income return on May 9, 1865, for the year 1864. The defendant was a merchant engaged in the wholesale and retail staple and fancy dry-goods business in the city of Portland. In his return he stated the gross profits of his business at \$8,800, and deductions on account of clerk hire, rent and losses at \$6,752—leaving \$2,048 of net income. The assessor for the district—Mr. Frazer—being dissatisfied with the return, caused an examination of defendant's books to be made, upon which he assessed his gross profits at \$15,000 and deductions at \$6,225—leaving \$9,613 of net income. The assessor also assessed the defendant with the penalty authorized by the Internal Revenue Act for making incorrect return. After the finding of the indictment—on July 26—the defendant made and verified an amended return, in which his gains and profits and deductions were stated in accordance with the result of the examination of his books as aforesaid, upon which the assessor remitted the penalty aforesaid. The far greater part of the deductions contained in the first return were claimed by the defendant to have been losses by bad debts made within the year. The principal question contested before the jury on the evidence, was as to the truth of the statement concerning the gross amount of the profits for the year.

The United States v. Jacob Mayer.

The evidence tended to show that the gross amount of sales was \$82,000, and that the profits on sales over first cost, freight, and insurance, were from 15 to 20 per centum; and that on December 31, 1864, the defendant made up and entered in his books a list of what he then deemed bad debts, which amounted to no more than \$1,200 to \$1,500, some of which were afterwards collected.

The indictment was found on July 7, 1865. On the trial the Court delivered the following charge to the jury:

DEADY, J. Gentlemen of the jury, you have listened long and patiently to the allegations and evidence of the parties and the argument of counsel. It is now the duty of the Court to instruct you in relation to the law of the case, and to give you such suggestions and directions concerning the evidence and the rules which should govern your deliberations and action as may appear proper and appropriate.

The indictment against the defendant is found under section 42 of the act of June 30, 1864 (13 Stat. 239), commonly called the Internal Revenue Act, which provides as follows:

“That if any person in any case, matter, hearing or other proceeding in which an oath or affirmation shall be required to be taken or administered under and by virtue of this act, shall, upon the taking of such oath or affirmation, knowingly and willfully swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be subject to the like punishment and penalties now provided by the laws of the United States for the crime of perjury.”

You will observe, gentlemen, that this section defines the crime to consist in “knowingly and willfully swearing falsely” as to any matter in which the oath is required by this act. This act does not prescribe the punishment, but provides that the punishment shall be in accordance with the law of the United States punishing perjury. The general act on this subject (4 Stat. 118), defines the crime to consist in “knowingly and willingly swearing falsely”—not differing

The United States v. Jacob Mayer.

materially from the definition given in section 42 of the Internal Revenue Act—and prescribes the punishment to be by a fine not exceeding two thousand dollars and imprisonment at hard labor not exceeding five years.

Something has been said to you by counsel concerning the punishment prescribed by law for this crime, and how much or how little this circumstance should affect the deliberation or the decision of the jury. On that question I deem it proper to say something to you, and I will say it here. It is true, as has been stated by the counsel, that when you have passed upon the fact as to whether the defendant is guilty or not guilty, the punishment must be fixed by the Court, and not by you. It is the duty of the jury to find the defendant guilty or not guilty, as they may determine from the facts shown by the evidence. The defendant may be punished under the statute according to the aggravation of the offence, by fine not exceeding two thousand dollars, or it may be one dollar, and by imprisonment in the penitentiary—for that is what confinement at hard labor signifies—for a term not exceeding five years, or for one day. So far, gentlemen, as this punishment is concerned, it is not in itself to determine the result of your deliberations. You are not to find the defendant guilty because the law prescribes a light punishment for the offence, nor to acquit him because it imposes a heavy one. The jury are selected to try the guilt or innocence of the defendant, and not to prescribe the extent or manner of the punishment. The whole people of the United States, represented in Congress, are the law-making power, and they determine by a rule uniform throughout the United States, what acts shall be declared criminal, and how and to what extent they shall be punished; so that it is not within the province of any particular jury to judge as to the punishment of a crime. The jury can only determine the guilt or innocence of the prisoner. Yet it is human nature, and it is reasonable that, in determining the question of a man's guilt or innocence, a jury should consider the result of their verdict, and that, in proportion to the severity of punishment, their deliberations should be

The United States v. Jacob Mayer.

marked with gravity and seriousness. A jury in determining a case where a man's life is at stake, would scan with more care the testimony of witnesses than in some ordinary case where only a few dollars are in controversy; but, nevertheless, you are not to violate your oaths by returning a verdict contrary to your honest convictions arising from the evidence because of the punishment prescribed by law.

While speaking of punishment, I may also say, that if you see proper you may recommend the criminal to the mercy of the Court. I do not wish to mislead you in this. It would still rest with the Court to examine into the merits of the case and determine the punishment within the limits fixed by the law, but in so doing the Court would give respectful heed and consideration to your recommendation, and be governed by it so far as appeared proper and reasonable.

The defendant in this case is charged by the indictment of the grand jury of this district with the crime of perjury, alleged to have been committed on May 9, 1865, by willfully and knowingly swearing falsely to the statement of his gains and profits for the year 1864.

To this charge the defendant pleads not guilty, and this plea of his, in law, controverts every material allegation of the indictment, and puts the proof of them upon the government.

The paper in proof which contains the statement sworn to on May 9, 1865, contains many matters not material to your inquiry in the determination of this case. The perjury, if any, was committed in swearing to the statement at the head of the paper, wherein the defendant says that the whole amount of his gains and profits for the year 1864 was only \$8,800. Following this immediately is the statement of the expenses of the business—proper deductions to be made from the gross gains or profits.

Your inquiry, then, as to whether the defendant has committed the crime of perjury as charged in the indictment, will be confined to the truth or falsity of this statement—that the gross gains and profits of the defendant for the year 1864, were only \$8,800.

The United States v. Jacob Mayer.

The statement of the defendant's expenses in carrying on his business, as set forth in his first return, has not been controverted by any proof, if I recollect aright, except so far as the same is contradicted by the statement in the second return.

The claim of the prosecution, that you may find the defendant guilty on account of the contradictions in the two affidavits in this particular, is not sustained by the law applicable to the proof of perjury. The two affidavits standing alone, simply equalize each other—the proof afforded by them is in a state of equilibrium. Although you may have an opinion that the first is false and the second true, yet it would not be based upon such evidence as the law requires to produce and sustain a verdict of guilty upon an indictment for perjury. There must be some other proof, besides the admission in the second affidavit that the first is false in this particular. As I have said, then, the question for your determination is, whether the defendant committed perjury by willfully stating his gross gains and profits for the year 1864 to be only \$8,800—knowing the same to be false.

To ascertain whether this statement is true or not, you must inquire what the gross gains or profits of the defendant really were. For this purpose you may take the proof of the gross amount of sales for the year, which appear to be within a fraction of \$80,000. Take the proof as to what are the customary profits of such business during the year and find the reasonable average of them, and this you may assume to be the profits of the amount of sales. Deduct from this amount the expenses of the business as given in the statement of the defendant, except the items of insurance, freight and expressage, and you have the gains and profits except as I will further state to you. I except the items of insurance, freight and expressage, because all the witnesses in stating the usual rate of profits for that year, have taken such expenses into the account.

One other matter of deduction, and that is the insolvent debts or losses. As the Court construes the Internal Revenue Act, and it is the most favorable construction that

The United States v. Jacob Mayer.

could be made for the defendant, the defendant was authorized to deduct from his gross gains or profits, the amount of any debts which accrued and became insolvent in the year 1864. It is not sufficient that a debt became insolvent between the last day of the year and May 9. His affidavit, although made on May 9, 1865, is made not with reference to the state of things then existing, but as to what existed at the close of the year 1864. If you find from the testimony that any of these debts of which the witnesses have spoken, did become insolvent in the year 1864, or that the defendant as a reasonable man had good reason to think so, then you will deduct these from the gains or profits, thus ascertained. If by this process you find that the gains or profits of the defendant substantially agree with his statement of May 9, then the statement is not false, and your verdict must be not guilty. In determining what debts the defendant regarded as insolvent, on December 31, 1864, if you find that the defendant at the time of closing his books at the end of the year, separated his solvent debts from his insolvent debts as a business transaction, this is the best evidence of what the defendant believed to be such debts. When a merchant at the end of the year, without reference to any pending controversy sits down in his counting-room, and deliberately determines that A & B are insolvent and C & D solvent, this is better evidence of what the defendant knew and thought about the condition of these debts at that date, than claims and opinions formed after a controversy has arisen about the matter.

If by this process, however, you find that the return made on May 9, was false, then you are to inquire whether the falsehood was knowingly and willfully stated by the defendant. This is a common sense question for you to determine from the evidence. If a person is honestly mistaken in his sworn statement, this is not perjury, or if he makes it honestly upon the advice of counsel after stating to him all the facts, where the question involves a question of law. But if a man rashly or fool-hardily swears to what he knows nothing about, or has no good reason to believe true, he

The United States v. Jacob Mayer.

cannot claim that this is a mistake, and the law declares it perjury. So if an oath is taken upon the advice of an attorney, it is not an excuse or justification, if the advice goes to the facts and not to some question of law. But in this case there is no evidence that the oath of May 9 was made under the advice of counsel or anybody else.

If you find that the oath was false, but taken not rashly or inconsiderately, and without knowledge of its falsehood, then your verdict should be not guilty. But if you find that the oath was false, and the defendant knew it, or took it rashly without knowing whether it was true or not, then you should find the defendant guilty.

One word as to the corrupt intent. The words of the statute defining the crime are *knowingly and willfully*—the word *corruptly* is not used. It may be a question whether the Court should construe this statute, so as to require it to appear that the oath was taken knowingly and willfully with a *corrupt intent*, but the Court will so construe it. A corrupt intent, is a purpose to procure or make some unlawful advantage or gain to the affiant, or to injure another. This corrupt intent you may infer from all the circumstances of the case. It is a mere matter of calculation to prove that the smaller the return, the less taxes the defendant would have to pay. If you find then that the oath was knowingly and willfully false, to a statement of his return which was less than the fact, it is a legitimate and reasonable inference, that the defendant took the oath for the purpose of unjustly and wrongfully securing to himself a portion of this tax, or what amounts to the same, defrauding the government out of it.

These are the general instructions which I deem it necessary to give you—to which I will add some remarks in relation to particular matters.

In regard to the second affidavit, let me remind you that the perjury charged against the defendant in the indictment, is not alleged to have been committed in swearing to it; and therefore, although such affidavit may be false—although the defendant did actually commit perjury in swearing to it, he

cannot in this action be found guilty on that account. The question of guilt or innocence turns exclusively upon the fact as to whether the defendant committed the crime of perjury in taking the first affidavit. The defendant has been allowed to show to you the circumstances attending the taking of the second affidavit, so far as he desired to do so. What was said to him and what was said to others engaged in taking it, or who were merely lookers-on and taking no particular part in the matter—for the purpose of enabling you to judge more correctly as to whether this second statement was made by him because it was true, or whether he was induced to take it by the representations and inducements of others, although he knew it was false, thus showing you how much credit you are to give to it, in determining as between it and first affidavit, which is true. Counsel for the defendant in his argument to you last evening, read to you the report of the testimony given by Backenstos, a witness who appears to put everything in the most favorable light for the defendant, and I deem it proper to call your attention in this connection also to the statement of Thomas Frazar, the officer who had control over the proceeding—rather than Backenstos, who is a clerk in Mr. Frazar's office. If you will remember, Mr. Frazar testified that he told the defendant that he might sign the second affidavit or not, as he pleased; that it made no difference with him, whether it was signed or not, the taxes would be collected upon that assessment anyhow, but for the sake of having the papers in the office in regular form, he would prefer that they should be signed by the defendant. Now, Mr. Frazar was the person in authority. You are to consider also, what was said to the defendant at the time he signed the affidavit, by the witness Grooms, who appears to have been a deputy of Mr. Frazar, and who administered this oath and was exercising authority at the time. Grooms said to the defendant, as you will remember, that he had better sign it; that he was instructed to say that if the defendant would sign it, he would thereby be relieved from the penalty imposed by the assessor, on account of the alleged misstate-

The United States v. Jacob Mayer.

ment in the false income return. Mr. Frazar was the officer in authority, and Mr. Grooms was exercising authority as his deputy. You are, therefore, to consider what was said by them. All these circumstances are to be considered by you in determining whether the second affidavit is true or not true, and how far it goes to show that the first one is false.

So far as the testimony relative to the penalty is concerned, it has been given to the jury to enable them to determine how far the defendant may have been induced to make the second affidavit, although he knew it to be false, for the purpose of being relieved from the payment of this additional sum.

As to what proof is necessary to constitute perjury, the old law was, that two witnesses were necessary to establish the falsity of the matter sworn to, but that rule has been greatly modified. First, it was modified by substituting for it, the rule that one witness and corroborating testimony or circumstances should be sufficient to prove the charge of falsity.

In the courts of the United States, books and documents alone have been held sufficient proof of the falsity of the oath. A celebrated case was quoted in your hearing last evening by counsel for the defendant where the falsity of the matter sworn to by the party as shown by the books, and papers kept by the defendant and under his control and inspection, was held sufficient proof of perjury, without a living witness. This was a case in which a party importing goods from Liverpool to the United States made oath to their value at the custom-house, which oath was shown to be false by the books and letters of the defendant. The ruling in this case was affirmed in the Supreme Court of the United States; (*United States v. Wood* 14 Pet. 430), and the law established that a party can be convicted of perjury without the evidence of any living witness as to the falsity of the oath. In this case, the second affidavit is a solemn admission under oath that the first affidavit is false. The testimony in regard to the sales of the defendant, as shown

by his books and the testimony as to the profits upon such sales, is testimony as to the truth or falsity of the statement made in the first affidavit. If, then, you believe from the testimony given you, that this statement is false, and that it was made knowingly and willfully and with a corrupt intent, that will be sufficient evidence to justify you in finding a verdict of guilty.

A good deal has been said as to these books of the defendant. You are to presume, gentlemen, and act upon that presumption, that all the testimony which is pertinent to the issue in question and favorable to the defendant, has been submitted to you. Any pretences to the contrary are mere buncomb, made by the counsel for the defendant for the purpose of influencing your minds otherwise than the testimony would warrant. I say such is the presumption. You are to decide this case as you have sworn to do, according to the evidence given you, and not according to what the counsel may tell you as to what might have been proved. So far as these books are concerned their contents have been shown to you only so far as to ascertain their truth and explain the statements made by the prosecution concerning them. This the defendant has been allowed to do—anything more would be irrelevant. For instance, the prosecution proves to you by testimony of the witnesses who have examined the books that the sales amount to so much, which requires no expert book-keeper, no great amount of mercantile erudition to ascertain, and if it did, the defendant might have had twenty book-keepers to examine them if he had desired it. The presumption is that this statement of the amount of sales is correct. The prosecution have also shown by Harry Nevison that between January 1, 1864, and January 15, 1865, at the time the defendant was posting his books and taking an account of business for 1864, an examination of the books was made, and that he selected such debts as he then considered bad and entered them on a page of the ledger for 1865. According to this selection the bad debts amounted to something between twelve and fifteen hundred dollars. As for the statement by counsel for de-

The United States v. Jacob Mayer.

fendant that the amount of the profits for the year 1864, should be shown by the books rather than the testimony of witnesses as to the average profits on such sales, you will remember, gentlemen, that the testimony of Backenstos was that he found no profit and loss accounts in the books, and there has been no testimony offered or given to contradict this statement, except that concerning the page of bad debts shown by the prosecution.

A good deal has been said to you about the veracity of the witness, Nevison. You are the exclusive judges of the credibility of the witness and you should not act rashly nor without judgment in exercising that decision. The witness, Nevison, has been assailed by the defendant as unworthy of belief. It is claimed that he harbors feelings of revenge or malice against the defendant, and that he has denied, or refused or failed to remember certain offensive remarks or threats which he made in relation to the defendant which other witnesses have testified to. You will take into consideration, in determining all these circumstances, the question whether a man may not hate another and yet tell the truth about him, whether he may not feel like seeing him punished and yet not necessarily play the part of a liar to injure him, particularly when under oath; but when you find a witness in a state of mind which evidences strong hatred toward the defendant you should be on your guard, for his passion may so sway his judgment or warp his memory as to cause him to misrepresent the facts. He may remember things and brood over them until he greatly enlarges them; but it does not follow, by any means, that because a man dislikes another, he will willfully swear a lie against him. On the other hand some of the witnesses are said to be old and warm friends or dependents of the defendant, and it may be well for you to consider whether love is not as strong a passion as hate. A devoted friend of the defendant is as likely to swear falsely in his favor, as an enemy against him. You are to consider these things; I put you on your guard.

Again, a witness may through mistake swear falsely as to some particular, and yet testify truly as to others. Of this

you may be satisfied from the innate probability of his statement or the corroboration or other admitted or established facts and circumstances before you. But if you are satisfied that a witness has intentionally sworn falsely in any material particular in his testimony, the remainder of his evidence should be received with distrust and not credited unless extremely probable in itself or corroborated. You are also the judges as to what the witness did say.

One thing more, as to character. Evidence has been introduced by the defendant to show that he has a good character for truth and veracity. Character is only important as evidence when a case is doubtful. No proof of good character against plain proof of guilt can be considered, because experience has shown that the best of men have fallen; but in cases of doubt, if it appears that a man has had a good character in the community in which he has lived, the fact should be taken into consideration by you as a circumstance against the probability of guilt. The law presumes a man innocent until he is proven to be guilty. To establish the fact that a man has, for years, borne a good character for truth and veracity in a community, it should be shown that he has lived in the gaze of the public, that he has been criticised, canvassed and tried and found worthy of confidence in this respect—but simply to show that nothing has been said about his character *pro* or *con*, is little more than the presumption which the law makes—that he is innocent.

In conclusion, gentlemen, allow me to say that you have an important duty to perform, both as regards the people of the United States and this defendant. As has been said of old, an oath is the end of controversy. Whenever it comes to pass that a man may swear falsely with impunity, all confidence between man and man will be at an end. Then there will be an end to the security upon which rests the fabric of civil society and government—the correct and impartial administration of justice.

The jury were unable to agree and were discharged without finding a verdict.

Joseph N. Dolph and Leopold Wolf, for the plaintiff.

William Strong and W. W. Page, for the defendant.

Cullen Chapman v. School District No. 1, and others.

CIRCUIT COURT, FEBRUARY 27, 1866.

CULLEN CHAPMAN v. SCHOOL DISTRICT NO. 1, THE CITY OF PORTLAND, AND BENJAMIN STARK.

A dedication of land to public uses by parties in possession thereof, prior to the passage of the Donation Act of September 27, 1850 (9 Stat. 496), does not affect such land in the hands of other persons who may succeed them in such possession.

Although by the terms of the Donation Act, the land is granted to the settler, in consideration of his occupation thereof, prior, as well as subsequent to the passage of such act, the grant itself does not take effect prior to, or relate back beyond such passage, and therefore, a parol dedication or quit-claim to public use of a portion of such land by such settler, prior to the passage of such act, does not affect the after acquired estate in the premises.

A dedication by parol, being an attempt to pass an interest in lands, contrary to the statute of frauds, should not be allowed, unless plainly proven, and ought not to be inferred from facts not inconsistent with a contrary conclusion.

A multitude are no more meritorious in the eyes of the law, than a single person, and it ought not to be presumed that the latter has parted with his property, without benefit to himself, because a whole community, however numerous, lay claim to it.

A dedication to public uses, alleged to have been made within the memory of living witnesses, cannot be proved by reputation.

A bond made by Lownsdale and Coffin, on November 26, 1849, for a deed to a lot, upon the sole consideration that the obligors therein—"the trustees of the school and meeting house of Portland, and their successors in office"—should do and perform certain things in the condition thereof written, is a mere gratuitous promise, until performance or an accepted promise of performance of such condition, and therefore will not be enforced against the obligors in equity.

School District No. 1 of the county of Multnomah, is not the successor of "the trustees" aforesaid, and therefore cannot claim any interest in such bond, or enforce it.

A condition in said bond that "the trustees" aforesaid, should be incorporated by legislative enactment, and thereby authorized to hold the lot aforesaid, for the use of the town of Portland, for school and meeting house purposes, "exclusive of any restrictions of any school law," is not void, as being contrary to public policy.

The city of Portland is not the successor of "the trustees" aforesaid, and is not authorized by law to take and administer the trust proposed in the condition of said bond, and therefore, cannot claim any interest in or enforce it.

Cullen Chapman v. School District No. 1, and others.

There is no privity between Stark, the complainant's grantor, and the obligors in said bond, and he is not bound by it nor his grantee, the complainant.

DEADY, J. This suit was before this Court at the term of January, 1865, upon exceptions for impertinence to the answer of the city of Portland.* It is brought to quiet title to the complainant's interest in lot 3, in block 29, of the town of Portland. The bill alleges that the complainant is seized in fee simple of an undivided one fourth of said lot, and Benjamin Stark the other three fourths thereof; that the defendants—School District No. 1, and the city of Portland—wrongfully claim, and pretend to have some interest or estate in the premises, adverse to the complainant and defendant Stark, and prays a decree quieting his title, etc.

Stark was not served with process and did not appear. The other two defendants filed separate amended answers on January 9 and 13, 1865, respectively.

The defendant, School District No. 1, denies the allegations of the complainant, and for further answer avers, that on November 26, 1849, Daniel H. Lownsdale and Stephen Coffin, they being then in the joint possession, under the laws of the provisional government of Oregon, of about 640 acres of the public lands, known as the Portland land claim, and including the lot in controversy, did sell to the citizens of Portland, lot No. 3, in block No. 29, and put them in possession of the same, for a valuable consideration, and did at the date last mentioned, also agree in writing to convey said lot to said citizens. A copy of this agreement is attached to the answer and marked, Exhibit A. That in accordance with such agreement the said citizens took possession of the lot and built a school house thereon, elected trustees and caused the same to be used as a public school for the education of the youth of Portland; that afterwards the said citizens were by law organized into School District No. 1, with power and authority, through directors, to conduct a school in the town of Portland; and

*Chapman v. School District No. 1 et al., Ante, 108.

Cullen Chapman v. School District No. 1, and others.

that said school district did elect directors, who, in pursuance of an agreement with the trustees of the citizens of Portland aforesaid, made on November 24, 1852, did on behalf of such district, enter upon and occupy said lot and house for a public school, and thereafter such trustees ceased to occupy such lot and house for school purposes, "except by and through the defendant"—School District No. 1; that the defendant occupied the premises until 1857, when one McEwan entered upon them and excluded the defendant, and in 1863, gave the possession to the defendant Stark, for the purpose of defrauding the district of its use; that the defendant continued to act as School District No. 1, by virtue of the General School Law of October 17, 1862, and is exclusively authorized to take charge of all property belonging to the citizens of Portland for school purposes, and is willing and now ready to maintain a school at the place in question; that Stark, at the time of the execution of the exhibit A, claimed a portion of said land claim, including the premises in controversy, adversely to Lownsdale and Coffin, under the same laws, and in 1850 said Stark, and Lownsdale and Coffin, compromised their conflicting claims to the said land claim, and thereby established the boundary between them, so as to leave the premises in question within the land claim of said Stark, and that Stark, in consideration of the premises, agreed with Lownsdale and Coffin to recognize and confirm the acts and doings of the latter, concerning lot 3, in block 29, and with full notice of the same did then and there ratify and confirm the same; that afterwards Stark obtained the land conceded to him by the establishment of boundaries, as aforesaid, from the United States, as a settler under the Donation Law of September 27, 1850. That at the date of the compromise aforesaid, and after making claim as a settler under said Donation Law, said Stark did also set apart and dedicate the premises in controversy, to the citizens of Portland for the uses of a public school for the education of the youth of said town, and continued to recognize said dedication and public right from the time when he took possession of the

Cullen Chapman v. School District No. 1, and others.

same as aforesaid; and that Stark, in making claim under the Donation Law, claimed to be a settler on such land during all the period herein referred to, and prior to the time of the settlement of the conflicting boundaries between himself and Lownsdale and Coffin.

The amended answer of the city of Portland is substantially the same as that of the school district, except that it avers that the corporation of Portland, is entitled to the trust alleged to have been created by the bond of November 26, 1849, and the proceeding thereunder, and not the school district, and that all the conditions upon which said bond was made, have been performed by or on behalf of the citizens of Portland, and that the municipal corporation is legally entitled and capable of taking such trust and administering it.

The cause was heard upon the amended bill, answers, exhibits thereto and proofs. Upon careful consideration of these, I find the following conclusions of fact to be satisfactorily proven:

I. That on May 22, 1849, certain persons subscribed a writing whereby they agreed to pay severally, certain sums of money, to such persons as a majority of the subscribers should designate, for the purpose of building a school and meeting house in the town of Portland; and that such subscribers, at a meeting of the same, held at Portland, June 5, 1849, did elect William M. King, Stephen Coffin and William Warren, Sen., trustees, to carry into effect the purpose of such subscription, and did then and there authorize such trustees to purchase a lot and provide for the building of such school and meeting house in Portland.

II. That on July 2, 1849, the trustees aforesaid, by the name and description of the "trustees of the subscribers of the Portland school and meeting house," did agree in writing with William Warren, Jr., for the construction of "a house for the purpose of a school and meeting house," for which the contractor, Warren, was to receive from such trustees the sum of twenty-two hundred dollars.

Cullen Chapman v. School District No. 1, and others.

III. That on November 26, 1849, Daniel H. Lownsdale and Stephen Coffin, were in the actual possession of the public land, commonly called the Portland land claim, which included the premises in controversy, and that being so in possession, the said Lownsdale and Coffin, did make and sign the following bond for a deed to said premises:

“Know all men by these presents that we, Stephen Coffin and Daniel Lownsdale of the town of Portland, in the territory of Oregon, are bound and firmly held, in the penal sum of three hundred dollars, good and lawful money of the United States, unto the trustees of the school and town meeting house, in the aforesaid town of Portland, who now act as such, and to their successors in office, for the punctual payment of which, we bind ourselves, our heirs and administrators or executors firmly by these presents, in witness whereof, we have hereunto set our hands and affixed our seals, this 26th day of November, A. D. 1849.

“The conditions of the above obligation are such, that having this day sold unto the citizens of the town of Portland all that lot or parcel of land, known on the plat of said town, as lot number three in block twenty-nine, being fifty feet in front on First street, and running one hundred feet back, and lying on the western side of said street, and by these presents given possession of the same—Now, know you, that if the people of this beforenamed town of Portland, shall elect any number of trustees to frame a constitution for a body corporate, and they the said trustees, shall be authorized thus, as trustees of said property to hold the same for the use of the town of Portland, exclusive of any restrictions of any school law, and if they shall be thus constituted trustees by the legislative body of the territory of Oregon, and they be limited to use and keep the same for a school, or for holding town meetings, or holding such meetings for the improvement of youth, the advancement of science or such other purposes as they, the people of said town shall see fit; *Provided, however*, that nothing but holding courts (in the absence of a more suitable place being provided by the county), shall interfere with the holding

Cullen Chapman v. School District No. 1, and others.

schools in the same, except in case of public emergency, for holding public meetings. And if the said Stephen Coffin and Daniel H. Lownsdale, shall make or cause to be made, a quitclaim deed to the beforenamed lot, then this obligation shall be null and void, and of no effect, otherwise to remain in full force and virtue."

(Signed) D. H. LOWNSDALE, *Agent for*

STEPHEN COFFIN,

{ Seal }

D. H. LOWNSDALE.

{ Seal }

And that the foregoing instrument was received for record in the clerk's office of Multnomah county, on September 6, 1864, and there duly recorded.

IV. That during the autumn of 1849, the "trustees of the subscribers to the Portland school and meeting house," caused to be built upon lot number three, in block number twenty-nine, described in the bond aforesaid, the house, as per contract with William Warren, Jr.

V. That on August 8, 1851, a large portion of the original "subscribers to and proprietors of the Portland school and meeting house," executed a writing, whereby they authorized William M. King, one of the trustees aforesaid, to sell at auction said house and lot, and to divide the proceeds between such subscribers.

VI. That from the erection of the house, in 1849, until November 4, 1852, it was occupied from time to time for public meetings, both religious and secular, holding courts and private schools, under the express or implied sanction and permission of the trustees aforesaid, or some of them.

VII. That on November 4, 1852, the directors of School District No. 1, took a lease in writing of the premises in controversy from William M. King and Z. C. Norton, acting on behalf of "the owners and proprietors" of the house aforesaid, for the term of twelve months, for the purpose of keeping a common school for the district therein, at the monthly rent of ten dollars.

Cullen Chapman v. School District No. 1, and others.

VIII. That School District No. 1 has never been in the possession of the premises in question, or used, occupied or controlled them, otherwise than as above stated; and that the city of Portland has never been in the possession of the premises, or used, occupied or controlled them in any manner, although during all the time from the erection of the house to the year 1855 or 1857, the inhabitants of Portland, or some portion of them, did hold meetings there from time to time as above stated.

IX. That the defendant, Benjamin Stark, was a settler upon a portion of the Portland land claim aforesaid, containing about forty acres, and including the premises in controversy, from September 1, 1849, and for four years thereafter, under and by virtue of the provisions of the act of Congress, approved September 27, 1850, commonly called the Donation Law, whereby he became the donor and owner in fee simple of such forty acres, including the lot in controversy, and that in pursuance of such settlement, and the proper proof thereof, a patent therefor, issued to the said Stark, from the United States, bearing date December 8, 1860, which patent was received for record in the clerk's office of Multnomah county, November 16, 1865, and there duly recorded.

X. That on September 12, 1864, the defendant Stark, by his duly authorized attorney in fact, William Cree, did convey by deed of quitclaim and release, the undivided one fourth part of the lot in controversy to the complainant, for a valuable consideration, which deed was received for record, in the clerk's office of the county of Multnomah, September 13, 1864, and there duly recorded; and that the complainant was at the commencement of this suit a citizen of the State of Maine, one of the United States, and had the legal estate in the undivided one fourth part of the premises in controversy.

XI. That on March 1, 1850, and prior to the settlement on the Portland land claim by Lownsdale or Coffin, the defendant Stark claimed to be entitled to the possession of an undivided half of the whole of such claim, but that on the

Cullen Chapman v. School District No. 1, and others.

date last aforesaid, the said defendant Stark entered into an agreement in writing with said Lownsdale, whereby the said Stark and Lownsdale compromised and settled their conflicting claims to the possession of the land claim aforesaid, so that, among other things, the said Lownsdale released and quitclaimed to the said Stark the forty acres of said land claim above mentioned, in consideration of which, the said Stark among other things, agreed with the said Lownsdale to ratify and confirm the conveyances "made by the said Lownsdale previous to January 1, 1850," of the lot in controversy; and that subsequently Stephen Coffin ratified and assented to this agreement and settlement of the conflicting claims.

XII. That said defendant Stark never made any dedication of the lot in question to either of his co-defendants, or to any public use whatever, although on several occasions since the year 1855, he, in casual conversation, expressed a purpose or willingness to convey the same to the city or public, provided they would reimburse him the expenses he had incurred in improving the property and the streets and walks around it, but that nothing was done by either party to carry out such purpose or intention.

XIII. That since the commencement of this suit, the defendants, "School District No. 1, and the City of Portland, have each, through the agency of the officers of such corporation, assessed the lot in question to said Stark as the owner thereof, and collected and received from him the taxes properly leviable upon said assessment."

XIV. That the town of Portland, including the Portland land claim aforesaid and the land claim of John H. Couch, was first erected and constituted a city corporate, by the name of the "City of Portland," by act of the legislature of the territory of Oregon, passed January 23, 1851. That by said act it was provided, that the "mayor, recorder and council of said corporation shall be a body corporate and politic, * * * and shall be capable in their corporate name and capacity to acquire property, real, personal and mixed, for the use of said corporation, with power to sell

Cullen Chapman v. School District No. 1, and others.

and convey the same;" but that by such act no provision whatever was made, whereby the city of Portland or the inhabitants thereof could or might accept the trust specified in the bond from Lownsdale and Coffin, nor does such act contain any provision by which such corporation is authorized or permitted to receive, hold or use land for the purpose of education or religious meetings, or in anywise to provide for, conduct or carry on any such scheme or enterprise. This act was superseded by the act of January 31, 1853, which latter act was in turn superseded by the act of January 24, 1854. This last mentioned act was amended by acts passed respectively January 15, 1858, October 17, 1860, and October 17, 1862. The act of January 24, 1854, and the amendments thereto, were superseded by the act approved October 14, 1864, which still remains in force; but none of these acts, subsequent to the first, changed or enlarged the powers of the corporation, with reference to the subjects above mentioned.

XV. That the defendant, the School District, No. 1, is a public corporation existing under the laws of Oregon, now and since November 4, 1852, but at what time prior thereto it was organized and established does not appear. .

The first act passed in Oregon in relation to common or public schools, and authorizing and providing for the establishment and organization of school districts, was passed September 5, 1849. This act authorized and required the county school commissioners of the respective counties, before January, 1851, to lay off their respective counties into school districts, and allowed the people of any town or neighborhood, until this was done, to form school districts for themselves, "and perform all acts and duties therein, in accordance with the provisions of this act." The directors of a district constitute a corporation, and as such corporation might receive for the use of the district, lands whereon to build a school house. This act was amended by acts passed respectively January 15, 1852, and January 31, 1853. The act of September 5, 1849, and the acts amendatory thereof, were superseded by the act passed January 12,

Cullen Chapman v. School District No. 1, and others.

1854. This latter act was also amended by the acts passed respectively January 31, 1855, and January 17, 1857. The act of January 12, 1854, and the acts amendatory thereof, were superseded by the act of October 17, 1862. All of these acts subsequent to the first, contain similar provisions for the establishment and organization of school districts, declare them to be corporations, and authorize them to purchase and hold lands, whereon to build school houses for the use of district schools, subject to the limitations and restrictions of the school law. But none of these acts authorize or permit a school district to hold lands generally, or to maintain any particular or special description of school. The school district is independent and separate from any town organization. It is established and its boundaries defined by a county officer, and these may be wholly changed and modified from time to time to suit the wants and convenience of the public interested, including that of the neighboring districts.

XVI. That the complainant had notice of the foregoing facts, at the date of the conveyance to him, by Stark.

Upon this state of facts, what is the law of the case, or what are the legal or equitable rights of the parties, to the premises in controversy, is the question for the Court now to determine.

The claim of the defendants before the Court, or either of them, that Stark dedicated this land to public uses, being found untrue in point of fact, is thereby disposed of. But as this point was insisted upon in the argument with some degree of earnestness, it is proper to give it a more extended consideration. To do this properly, it is necessary to lay out of view such matters as have no legal bearing on the question. And first, this is not a case like some cited in the argument, where the particular public claiming a dedication, have been long in the uninterrupted use and enjoyment of the property. In such cases, the use or possession itself, though not sufficient to constitute a title under the statute of limitations, is treated as evidence of a dedication, and by the aid of indirect evidence, deduced from other independent

Cullen Chapman v. School District No. 1, and others.

facts and circumstances, may be sufficient, in the absence of proof to the contrary, to warrant a Court in presuming that a dedication had actually been made. But this fact is wanting in this case—neither of the defendants before the Court have ever been in the use and occupation of these premises, except in the solitary instance of the school district above mentioned, and that was as a tenant, and not adversely to Stark. There is no presumption then in favor of the claim of defendants, on the ground of user or occupation.

Again, upon the question of dedication by Stark, the acts and doings of Lownsdale and Coffin are not to be considered—they have no legal relation to the subject. As to this matter, Stark and these parties are strangers, without privity of any kind. By this is meant, that a dedication or promise of a dedication by Lownsdale or Coffin, does not bind Stark and is immaterial with reference to the present inquiry. The reason of this—as has been suggested, is because there is no privity of estate between Stark and these persons. At the date of the bond from Lownsdale and Coffin, they only had the naked possession of the land, under the laws of the provisional government of Oregon, without any estate or interest in the premises whatever. Their acts and doings in no way bound the lands in the person who might succeed them in the possession. This state of things remained unchanged at the time of the agreement of March 1, 1850. The land was public domain—the title was in the United States, and Congress passed no law by which any person could acquire any interest in this land, until September 27, 1850. (*Parish v. Lownsdale*, 21 How. 293.) At the time of the agreement of March 1, 1850, Stark claimed to be entitled under the local law, to the possession of the undivided half of the whole claim of 640 acres, and in consideration that he would abandon such claim, Lownsdale thereby agreed and did abandon to Stark the exclusive possession of the forty acres of the claim, including this lot. Whatever, out of abundance of caution, may be the technical language of the agreement, this is the legal effect of it, because at that time, the possession, subject to the right of

Cullen Chapman v. School District No. 1, and others.

the United States, was all the parties had to bargain about or dispose of. This possession then, Stark took unencumbered by the previous acts and doings of any one—"as though the foot of man had never been on the land."* Subsequently, by virtue of his settlement under the act of September 27, 1850, Stark acquired the legal estate in the premises from the United States. This estate, although upon condition at its inception, the commencement of the residence and cultivation, on September 1, 1849, became absolute and indefeasible upon the completion of the performance of these conditions, on September 1, 1853, four years thereafter. Since the passage of the act of September 27, 1850, Stark being then in possession, and having the legal estate in the premises, any dedication to public uses, by him or his authority, will bind him or those claiming under him with notice. It is also claimed by counsel for the school district, that a dedication prior to that time, and subsequent to September 1, 1849, made by Stark, is binding upon the after acquired estate, for the reason that the act of September 27, 1850, granted the land to the settler on account of his residence and cultivation prior thereto, as well as subsequent. That this would be the proper construction of the law, in the case of a conveyance with covenants of warranty, or any express stipulation or agreement from which it would reasonably appear, that the parties dealt and bargained with reference to the possibility or contingency of the grantor or vendor acquiring title from the United States, I am well satisfied. But a simple quitclaim by Stark, during his occupancy and before the passage of the act granting the land, would in no wise affect the after acquired estate in the premises. Although the act of Congress grants the land, on account of the prior residence and cultivation, the grant itself, cannot be said to take effect before it was made—the time of the passage of the act. A grant of land by statute, for considerations transpiring years before, as for military services, takes effect from the date of the grant, and not the

* *Lounsedale v. City of Portland*, *Ante*, 39.

Cullen Chapman v. School District No. 1, and others.

performance of the service. In point of time, the grant and the cause or consideration of it, may be identical or widely separated. This was a grant on account of residence and cultivation, on grounds of public policy—as to the future, to promote the settlement of the public lands, and as to the past, to reward those who had settled and held the country for the United States, amid extreme privation and suffering, against the dangerous and savage Indian, and in the face of a foreign power, early and strongly intrenched upon the soil, in the persons and people of the Hudson Bay Company.

I am inclined to hold that a parol dedication to public uses, rests upon no different ground than a quitclaim deed, and if made before September 27, 1850, although by a party then in possession, who afterwards took the legal estate under the act, it would not bind the afterward acquired estate. Doubtless, where a clear case of dedication, so far as the act is concerned, was made out, under such circumstances, a Court of equity would be warranted in finding that the party had confirmed the act, after acquiring the estate, from evidence which in itself would be insufficient to establish the fact of an original dedication, or even might presume such a confirmation, in the absence of evidence to show that the donor had disavowed it at once, upon receiving the legal estate. Subject to these rules or principles, did Stark ever dedicate this lot to either of these defendants for public uses? Under the testimony, I am constrained to answer the question in the negative, and if necessary to go further, and say that he is not shown to have dedicated it to any public use whatever.

A mere intention to make a dedication to public uses, does not constitute a dedication. Where it is claimed that a dedication has been made by parol, it ought to be shown plainly and distinctly, and not left to be inferred from facts and circumstances, at best indifferent in themselves, and not inconsistent with a contrary conclusion. (*Irwin v. Dixon et al.*, 9 How. 30, 31, and the cases there cited.)

A dedication by parol is an exception to the general and salutary rule of the law, which provides that no interest in

Cullen Chapman v. School District No. 1, and others.

lands shall pass without a writing. To allow this exception, except upon clear and satisfactory proof, that the dedication had received the clear assent of the owner—was actually and deliberately made—would be subversive of the policy of the law, and dangerous to private rights. A multitude, or a public corporation are no more meritorious in the eyes of the law or justice than a single individual. A man ought not to be presumed to have parted with his property, without benefit or consideration to himself, because a community, however numerous, lay claim to it. The owner of real property may rest upon his title, and is not required to be always upon the premises, asserting his right, as against the world or any less number of persons, whom he may permit or suffer from time to time to be in the temporary occupancy or enjoyment of it. Particularly is this the case, where a private lot, laid out and marked upon the map as private property, is afterwards claimed for some special public use, like a site for a school or meeting house. Such a dedication, is the nature of things, altogether more improbable than that of *streets* and public *squares*. The latter are entirely consistent with the donor's interest, being essential to the sale of lots, and conducive to the building up of the town—in fact, are paid for by the sale of the adjacent lots at enhanced prices. What might be satisfactory proof of the dedication of the one, would be altogether insufficient to prove the other. A person may be presumed to do what is manifestly just to the public and promotive of his own interest, as to dedicate streets to the public, as an inducement for them to buy the adjacent lots; when he ought not to be presumed to do what is not demanded by justice to the public and is contrary to that interest—as to dedicate his private property for a school or meeting house site. No adequate motive is shown to have induced such a dedication, and it ought not to be allowed unless upon clear and unequivocal proof of the fact.

The testimony upon this point only goes so far as to show that upon several occasions, in casual conversations with acquaintances, Stark expressed a willingness or readiness to

convey this property to the city or the public of Portland, upon certain terms and conditions. But this was never done, for the sufficient reason, if no other, that the city or public never took any steps to obtain this conveyance, upon these or any other terms. But these conversations, construe them as you will, are no evidence of a dedication; on the contrary, they are an assertion of Stark's present title to the lot, coupled with a proposal to convey the same upon terms. They are not even evidence of a proposal to the public to convey, but are mere casual remarks to private persons.

Again, if Stark, in early times, was in doubt as to what his legal rights were concerning this lot, on account of his agreement of March 1, 1850, he might very properly say, as it is claimed that he did, that he intended to maintain his right to this property, as against any private person, without thereby admitting that it was the property of the city, or that he had or would dedicate it to public uses of any kind. If the city had an interest in the premises, or was entitled to a conveyance of the lot, by reason of the agreement of March 1, 1850, that was a matter of law, and beyond Stark's control or decision, and he was not called upon to express his opinion in the premises, in the statement attributed to him by Shattuck's testimony. That writing speaks for itself, and if by force of it the city is entitled to the premises, it is so entitled, independent of any alleged dedication by Stark, and no pretence of a subsequent dedication by Stark will help it.

These are the only facts, which have been proven, to show a dedication by Stark, and they are wholly insufficient for that purpose.

On the hearing, the defendants also offered the depositions of some witnesses, residents of Portland, to prove that by common reputation the property belonged in some way to the city. This testimony, besides being very meagre and unsatisfactory of its kind, was clearly inadmissible, and therefore ruled out. The matters testified to by these witnesses, are their own opinions of the controversy, or what they *understood* to be public opinion. They all relate to a

transaction, within the memory of living witnesses, and the opinions and understanding—public repute, to which they refer, are subsequent to the commencement of this controversy, and appear to have grown out of it. Of its kind, even, it was very meagre and indefinite. (1 Greenleaf, § 130; *McEwan v. City of Portland*, 1 Or. 300.) In this latter case, decided in 1860, the question of the admissibility of this testimony arose in an action for the possession of this same lot. Mr. Justice Stratton delivered the opinion of the Court, and maintained the inadmissibility of the testimony, beyond all question, upon both reason and authority. To speak somewhat colloquially—if such hearsay testimony were allowed to be heard in courts of justice, it would be very easy (if not common), for a few active and interested persons to *make* a reputation on the subject of who was entitled to a particular property, and then prove it in Court, by their own oaths. Such a proceeding might fitly be denominated—not *improving* but *talking* a gentleman out of his estate.

I next proceed to consider what right, if any, the defendants before the Court, or either of them have or can claim, by virtue of the bond to convey, from Lownsdale and Coffin, of November 26, 1849.

This bond is for a quitclaim deed to the lot in controversy. It is given, not to the public generally, nor to either of these defendants, but to the “trustees of the school and town meeting house of Portland, and their successors in office.” True, the condition of the instrument recites, that the obligors had that day sold this lot unto the citizens of Portland, but the obligation is to these trustees. Indeed, no persons are specially named trustees, and the complainants’ counsel objects that the bond is invalid on this account for uncertainty. But I think if such persons as are therein described, did in fact then exist, with the relation or office imputed to them by this description, that the designation is sufficiently certain. Looking back of the bond, we are enabled to find the causes which led to the execution of the instrument, and to identify certainly, the persons intended

Cullen Chapman v. School District No. 1, and others.

by the description—trustees of the school and meeting house of Portland. What was the condition of the infant settlement, since grown into the city of Portland, in the spring of 1849? From the testimony in this case, and the admitted history of that period, it is evident that the population did not exceed one hundred persons, and that there were not to exceed ten or twelve houses of any kind in the place. Under these circumstances as shown by the subscription paper of May 22, 1849, and the minutes of the meeting of the subscribers thereto, dated June 5, 1849, some of the residents of the place and the adjoining neighborhood, agree to pay money to build a school and meeting house for their *own use*—the enterprise to be under the sole control and management of such persons as the subscribers, or a majority of them, may choose. These subscribers, on June 5, 1849, choose three trustees, and authorize them to purchase a lot and provide for the erection of the building. On July 2, 1849, these trustees let the contract to build the house, for the sum of \$2,200, of which only \$1,900 was ever raised and paid, and a portion of this amount was subscribed and paid after that period. Whilst the project was in this condition, the bond was executed, and I think it apparent, nay, beyond doubt, that the persons described in the bond as the “trustees of the school and meeting house of Portland,” were the trustees of the subscribers to the school and meeting house, named in the minutes of the meeting of such subscribers, dated June 5, 1849. At the date of the election of these trustees, there were no such corporation in existence as a school district or the city of Portland. These trustees were appointed to represent and act only for the private individuals—the subscribers aforesaid. Under these circumstances, they purchased and took a bond for a deed to lot 3, from the then holders and occupants of the land claim, Lownsdale and Coffin—the former executing the instrument for himself and the latter. The penalty of the bond is three hundred dollars, but no consideration for the sale is mentioned or recited. The seal to the instrument imports a consideration, but, by the laws of this State, this

Cullen Chapman v. School District No. 1, and others.

presumption is disputable. From the nature of the transaction, the situation of the parties and the purpose intended, and from the absence of all evidence to the contrary, I am forced to the conclusion that the instrument was given without any pecuniary consideration—and without a consideration in law, this agreement could not be enforced. The only consideration which can be implied from facts in this case, to support this agreement, is that the trustees to whom it was made, should perform or procure the performance of the conditions upon which the contemplated conveyance is proposed to be made. The bond itself is a mere voluntary promise, and one sided; and until a performance of its conditions by the trustees, or perhaps an accepted promise of performance, it was in law only a proposition, revocable at the pleasure of those who made it. “Uses or trusts, to be raised by any covenant or agreement of a party in equity, must be founded upon some meritorious or valuable consideration, for courts of equity will not enforce a mere gratuitous gift (*donum gratuitum*), or a mere moral obligation.” (2 Story’s Eq. § 973.)

The object of the obligor in the bond, Lownsdale, was evidently to facilitate and assist the trustees of the subscribers in their enterprise, and assist in founding a school on his property. But he has his own peculiar notions of how this should be done, and he provides that these shall be complied with, as a condition precedent to his making the conveyance. These conditions were substantially, that the people of Portland should elect trustees, and form a constitution for their government, in the management of this property and the conduct of the proposed institution, which trustees, with this form of government, were to be also incorporated by an act of the legislature of Oregon territory, and thereby authorized to hold and manage the proposed trust, subject to the limitations and restrictions in the bond specified. As it appears that the trustees of the subscribers went into possession at once, and built the house upon it, and that on March 1, 1850, Lownsdale still contemplated the proposition as in force; by the covenant which he took

from Stark concerning the lot, the Court may be warranted in presuming, as a matter of fact, that in the meantime there had been an undertaking on the part of the trustees to perform the conditions of the bond, and that such undertaking was a sufficient consideration to support the agreement on Lownsdale's part. As it is not necessary that the decision in this case should turn upon any doubtful question of law or fact, I will assume, that in this way there arose a sufficient consideration to support the bond. Then the question arises, has there been a compliance with that undertaking, by a performance of the conditions of the bond, by either of the defendants before this Court, so as to entitle either of them to the trust proposed by the bond.

To begin with School District No. 1; is this the corporation contemplated in this bond? To this question it seems to me there can be but one answer—that it was not. It is impossible to come to any other conclusion, in the face of the express provisions in the bond, that the trustees or corporation to be constituted for the management of this property, were to hold the same for school or meeting house purposes, "*exclusive of any restrictions of any school law.*" At the very date of this bond, the first school law in the territory passed, September 5, 1849, under which School District No. 1 was organized and constituted a corporation, was in full force and effect. To exclude the operation of this or any other school law, in the management of this proposed trust, this condition is inserted in the bond. School District No. 1 is a public corporation of the State, the creature of this law, and can only take and hold real property as a *site* for school houses, wherein a common school is to be kept as provided by the general law. The trustees or corporation here intended, was simply a private corporation, to hold and manage this trust, according to their own constitution of government, subject only to restrictions provided in the bond, and the principal of these, is that they are not to be subject to or controlled by the public law governing public schools—the very life of School

Cullen Chapman v. School District No. 1, and others.

District No. 1, and its only and exclusive authority to act in any matter.

Counsel for the school district admits the force of this objection, but seeks to avoid it, by claiming that this provision in the bond is void, as contrary to public policy and law. This claim cannot be supported by reason or authority. The restriction was only to the effect that this proposed institution should be governed by its own constitution or act of incorporation, and not otherwise, which is the case with every private school or college, in the State. But if this condition be contrary to law or public policy, then the proposed trust would fail, and the property remain with the donor as though no agreement had been made concerning it. If the agreement was void in this respect, it was void in toto, for this was the first condition of it. A deed which purports to convey an estate contrary to law, is void, and nothing passes by it. So the objection of the counsel goes too far, because if well taken, it would follow that there is no valid agreement to convey this property to any one.

It is also claimed by counsel for School District No. 1, that the neglect of the legislature, to enact the law contemplated by the bond, is not to be allowed to work a defeat of the proposed trust. But this assumes that the legislature were in some way bound to sanction this project, for a particular school in the town of Portland, which assumption conflicts with the freedom of the legislature. The legislature was not bound to create this particular corporation described in the bond, and if they had done it, there could be no pretence, that another corporation, School District No. 1, was intended or authorized to act as the trustee of this proposed trust. The legislature may have deemed it unwise or impolitic to provide for the establishment of this peculiar kind of a school, with special endowments, in the town of Portland, independent of and in conflict with the general system of common schools, already provided for throughout the territory by the act of September 5, 1849.

It seems to have been the policy of the legislature, to provide for a uniform system of public schools, all completely

Cullen Chapman v. School District No. 1, and others.

subject to the authority and control of one general public law. This policy appears since to have become fixed in the constitution, which prohibits the assembly from passing any special or local law—"providing for supporting common schools"—and also enjoins upon the assembly the duty of providing "by law for the establishment of a *uniform* and *general* system of common schools." (Or. Code, 107, 117.) But the legislature had the power and the right to judge in the premises, and whether they acted wisely or unwisely, this Court is not authorized to review their action, or supply the necessary legislation, by means of a judicial decree. But the fact undoubtedly is, that the people of Portland were offered this trust, upon the condition that they would select the trustees, and form a constitution of government for the school, and procure the legislative sanction to the same, by an act creating these trustees a body corporate for that purpose.

That the people of Portland, or any one on their behalf, ever undertook or attempted to accomplish, or perform any of these conditions, there is not an iota of evidence, but the contrary is necessarily inferred from all the facts and circumstances. This also involved the consent of the subscribers to the building fund, or their trustees, who were a special association of individuals, and not the people at large of Portland. That they never assented to this trust, or agreed that their organization and subscription should be merged in or transferred to this proposed corporation or trustees, is plainly deducible from the fact, that on August 8, 1851, a large number of them signed a writing, authorizing one of their trustees, to sell the building and lot, and divide the proceeds among the subscribers, in proportion to the amount paid by each.

Again, School District No. 1 does not necessarily represent the people of Portland in any particular. To-day, its territorial limits may coincide with those of the city of Portland, and to-morrow they may include other territory, or new districts may be created within these limits, leaving District No. 1 to include only a small portion of the people

Cullen Chapman v. School District No. 1, and others.

of the town. School District No. 1 is a public corporation subject to be changed, modified or abolished by the legislature of the State, without reference to the conditions or purposes of the trust specified in the bond of Lownsdale and Coffin.

From these premises and for these reasons I conclude, that School District No. 1 has no interest, either legal or equitable, in the lot in controversy, because it is incapable of receiving or managing the proposed trust, nor in contemplation of the agreement was it ever intended that it should.

What are the rights, if any, of the city of Portland, by virtue of this bond? At the outset, I admit that the bond may be construed without doing violence to its terms, so as to permit a municipal corporation, created and organized for civil and political purposes—such as the government of the town of Portland, to take and administer the trust therein proposed. But I do not think such construction the most reasonable one, and it appears altogether improbable, when we take into consideration the facts and circumstances attending and immediately preceding the making of the bond. But supposing all this to be otherwise, has the city of Portland ever been authorized to take and administer this trust as proposed in the bond? Certainly not, expressly. In all the legislation concerning the municipal corporation of Portland, from the first to the last, it cannot be pretended that there is any express language which covers this case, or even recognizes the existence of the proposed trust. Is such a purpose or authority to be fairly implied from these acts, or any of them? Not that I have been able to ascertain. The purposes for which land may be acquired and held by the corporation of Portland, are expressly enumerated, and they are all in aid of some municipal power expressly granted to the city. The subjects of education, secular or religious, public or private, the advancement of science or the improvement of youth are not even hinted at in any of these acts, and they contain no general grant of power from which this particular power or authority can be implied or inferred.

Cullen Chapman v. School District No. 1, and others.

It seems to have been the policy of the territory as of the State since, to exclude towns and cities, as such, from the control and management of public education, and reserve that power to the organization called the school district, subject to the control of the legislature. The corporation of Portland is not authorized or empowered to keep or maintain a school of any kind, and this trust is proposed upon this condition expressly. If accepted or claimed by the city, it must be taken upon the terms and conditions prescribed. The bond, even if made for a pecuniary consideration, was a voluntary act. The obligor had a right to impose the conditions that he did. There was no law to compel him to sell or give his property for the use of a school. Whoever claims the benefit of this obligation, as trustee, must show at least a capacity in law to take and hold it upon the conditions which accompany it. The property cannot be held or claimed under the bond for any other purpose than that therein specified.

From these premises and for these reasons, I conclude that the city of Portland has no interest, either legal or equitable, in the lot in controversy, because it is incapable of receiving the proposed trust, and in contemplation of law it was never intended that it should.

What then appears to be the condition of the subject matter of this proposed trust, considered with reference to the bond, and the facts which led to and followed its execution. The truth of the matter seems to be this—sundry individuals in and about Portland, being about to build a private school and meeting house, (for however public in point of fact the intended use might be, yet in contemplation of law it was a private enterprise, just as an association to build and manage a wharf or market house would be,) the occupant of the land claim gave the trustees of this enterprise a bond for a deed to lot 3, provided they would modify their plan, and thereafter proceed according to the conditions prescribed therein. The house was soon built by these trustees, and used from time to time for private schools, religious meeting and public meetings, but no attention was

Cullen Chapman v. School District No. 1, and others.

paid to the conditions of the bond or any steps taken by any one to procure the appointment of the trustees and the creation of the corporation contemplated. In other words, the project proved abortive and was abandoned. A portion of the original subscribers, whose money built the house, authorized its sale, and on that authority one of the original trustees transferred or attempted to transfer the property to some private parties. The house being practically vacant, McEwan entered under this sale and occupied until ousted by Stark in 1859, who has maintained the possession of it to this day. In the meantime, about 1857, the city was induced to set up a claim to it, on the ground of its being in some way public property, but never succeeded in obtaining possession of it.

The trust never took effect—the purpose for which the bond was made was never carried out—the conditions were never complied with. Until this was done, not even the trustees of the original subscribers to whom the bond was made, could demand the performance of its obligation—the execution of the deed. The bond itself conveyed no interest in the land, it was only a promise to convey upon conditions, and the title or estate in the premises, if he had any, remained with the obligor. Near seventeen years have elapsed since the date of the bond, and nothing has been done or attempted to be done, towards accepting or carrying on this proffered trust. It probably came soon to be regarded as a visionary matter, and was abandoned for the public or common school system provided by law.

But admitting that one or the other of these corporations are entitled to take the trust specified in this bond, does the right affect the land as against the owner, Stark. The covenants between Stark and Lownsdale in the writing of March 1, 1850, are not to the obligees in the bond, and Stark is not personally liable upon them to either of these defendants, even if they were entitled to a performance of the bond as against Lownsdale and Coffin or their legal representatives. But independent of any covenant, if Stark had purchased this land of Lownsdale and Coffin, with notice of a prior

Cullen Chapman v. School District No. 1, and others.

contract to convey to others, equity would compel him to perform the contract of the vendor. The original purchaser would have a lien upon the land for the purchase money as against the second vendee, Stark, which equity would enforce by decreeing a conveyance or a sale of the land to reimburse the first purchaser, unless in the meantime other controlling equities had intervened. (*Champion v. Brown*, 6 Johns. Ch. 402; 2 Story's Eq. §§ 784, 788.) But this doctrine only applies where there is a privity of estate or of representation. If Stark derived title from the obligors in the bond, then this case would come within the rule, unless the long delay of his co-defendants to assert their supposed rights, would induce a Court to refuse a decree for a conveyance.

But there is no privity of estate between Stark, and Lownsdale and Coffin. Lownsdale and Coffin, at the time they abandoned the possession of the forty acres to Stark, were mere occupants of the public land. They had only the naked possession, which terminated with their occupancy and the commencement of Stark's possession. They had no estate in the land to convey to Stark, and conveyed none.* Stark took the land as an original settler, under the act of September 27, 1850, and derives his title directly from the United States, by virtue of such settlement. Therefore, if this bond had been a deed for lot 3, and made directly to the defendants or either of them, and there was no question as to their capacity in law to take such a trust, yet they would be without interest in the premises, because Lownsdale and Coffin had none to convey. There being no privity of estate between Stark and the grantors in such a deed, the grantees therein could not claim the land as against Stark, or those claiming under him. On the other hand, the defendants are not parties to the covenants between Stark and Lownsdale, and therefore he is not personally liable to them, or either of them, on account of them.

So, upon every aspect of the case, it appears to me that

* *Lownsdale v. City of Portland*, *Ante*, 39.

Cullen Chapman v. School District No. 1, and others.

the well settled rules of law are against the claims of the defendants, School District No. 1 or the city of Portland. Nor does it seem to me inappropriate, in a suit of equity, considering the allegations of the defendant's answers, for the Court to declare, that as against these defendants or either of them, who seek at this late day, after the property has become valuable, to entitle themselves to the benefit of this supposed trust, the right of the defendant Stark coincides with the equity and justice of the case.

These defendants appear to me to be not only without right, but without merit. Their claim seems to be an afterthought, put forward long after the really meritorious parties, the original subscribers, had abandoned the scheme as visionary and impracticable.

Decree in favor of the complainant, according to the prayer of his bill, quieting his title against the claims of the defendants or either of them, and that as against such defendants, he be taken and held to be the owner in fee, and have the legal estate in one undivided fourth part of the lot in controversy, and for the costs and disbursements, one moiety thereof to be paid by each of the defendants, before the Court.

W. W. Page, for the complainant.

Joseph N. Dolph, for the city of Portland.

Lansing Stout, for the School District No. 1.

The Active.

DISTRICT COURT, MARCH 12, 1866.

THE ACTIVE.

In a suit for forfeiture of a vessel under section 50 of the Collection Act (1 Stat. 665), it is not necessary to allege or prove that the goods unladen were of foreign growth or manufacture, but simply that they were *brought* in such vessel from a foreign port or place.

An allegation in a libel that goods were unladen from a vessel within the collection district of Oregon, is equivalent to an allegation that they were unladen within the United States—it being judicially known that such district is a part of the territory and within the limits of the United States.

In such suit, an allegation that the goods unladen were worth \$5,000, without saying at what place, port or district, is not sufficient; but it is not necessary to allege that the unloading was at a *port*; any place or district within the United States is sufficient.

An exception, that a libel does not state facts sufficient to constitute a cause of suit or forfeiture is too general; it should state in what particular the facts are insufficient.

Section 50 of the act aforesaid does not apply to an unloading of goods brought from a foreign port, within the limits of the United States, but unladed before the vessel has arrived at any port or place within a collection district; such a case falls within section 27 of said act.

DEADY, J. This suit is brought against the steamship *Active*, to enforce an alleged forfeiture thereof for a violation of section 50 of the act of March 2, 1799 (1 Stat. 665). The libel was filed October 26, 1865, and alleges that the vessel was seized by the collector of customs on that day at Portland, for the cause following:

That on or about October 1, aforesaid, the *Active* cleared from the foreign port of Victoria for the port of Portland, in the district of Oregon, “and on said voyage was laden with and imported and brought from the said foreign port of Victoria into the United States, as part of her cargo,” goods, etc., of the value at said district of \$5,000; and that after the arrival of the *Active* on said voyage, so laden as aforesaid, within the limits of the collection district of Oregon, to wit: the Columbia river, below the port of Astoria, on October 3, aforesaid, a part of the cargo of said vessel, of the value of \$5,000, “was unladen and delivered out of said steamship before she had come to the proper place to

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The Active.

discharge her cargo, or any part thereof," or had been authorized to unlade the same by a permit from the proper officer.

On December 4, the claimant—the California Steam Navigation Company—filed exceptions to the libel for insufficiency, and upon the questions raised upon these, the case has been argued and submitted.

The exceptions to the libel are five in number. All but the first one are merely technical, being founded upon the alleged insufficiency of the language of the libel to completely and absolutely express, what is apparently thereby intended.

The second exception is to the effect that the libel does not allege that the goods, etc., "were brought from any foreign port or place." The language of section 50 of the Collection Act, is "goods, etc., brought in any ship or vessel, from any foreign port or place." The language of the libel is—"On said voyage was laden with and imported, and brought from said foreign port of Victoria," etc. Omit the words *laden with and imported*, and this allegation of the libel is not only in effect the same as the language of the statute, but is actually identical with it. The addition of these words, does not change the sense or force of the phrase or clause, *brought from said foreign port*; but only strengthens and makes it more explicit. It is not necessary to allege that the goods are of foreign growth or manufacture, or that they should be so in fact. It is sufficient if it appears that the vessel brought the goods from a foreign port, and even, whether she first took them on in such port, is, I think, immaterial. The primary objection of this and other sections of the act, is to prevent frauds upon the revenue, rather than to punish persons for committing them; and to accomplish this, many acts, indifferent in themselves, but which, if permitted, might be made the means of committing, or facilitate the commission of such frauds, are prohibited under penalties. A vessel arriving in the United States from a foreign port, may have dutiable goods on

The Active.

board, and, therefore, she is not allowed to unlade any part of her cargo, without a permit from the proper officer of the customs. This exception is disallowed.

The third exception makes the objection, that the libel does not allege that the "goods, etc., were unladen or delivered *within the United States*." Admitting that the libel does not contain this specific allegation, as it properly should, it contains its legal equivalent. It is alleged that the illegal unlading and delivery took place "within the limits of the collection district of Oregon, on the Columbia river, below the port of Astoria." Of whatever is established by law the Court takes judicial notice, and the same need not be shown by either pleading or proof. The "collection district of Oregon" is established by act of Congress, and includes the State of Oregon, which is a part of the territory, and within the limits of the United States. The allegation of the libel is therefore equivalent to a specific averment, that the unlading and delivery took place within the limits of the United States. This exception is disallowed.

The fourth exception is, that the libel does not allege that the "goods, etc., were of the value of \$400 *at the port or district where landed*." This exception is based upon the provision in section 50, which forfeits the vessel in case the goods unladen are of the value of \$400, according to the highest market price of the same, "at the port or district where landed."

The libel does allege, that the goods *brought* from the foreign port on the voyage in question, were of the value of \$5,000 "at the district of Oregon," while the value of the goods illegally *unladen* in the district, is alleged to be worth \$5,000, but without stating at what *port, place or district*. These allegations concerning the value of the goods do not directly, nor by necessary implication, amount to an averment as to the value of the goods unladen "at the port or district *where landed*." Admitting that the goods *brought* from the foreign port were of the value alleged, *at the district of Oregon*, it does not follow that the goods *unladen* were of

The Active.

such value at such district, because it is not alleged that *all* the goods *brought* into the district were *unladen* in it, nor can it be so presumed. The allegation, then, as to the value of the goods *unladen* is not helped by the one as to the goods *brought*, and must stand by itself; and standing alone it states the value generally and at no particular place. It may be said, however, that this general averment of value includes the particular one, that the goods *unladen* were of the value of \$400 at the district of Oregon, and is therefore sufficient to admit the proof of the fact on the trial, or support a decree of condemnation if uncontroverted by the claimant. But this conclusion seems to be open to the objection, that of two constructions, the least natural and most favorable one to the pleader is adopted, or that an allegation which only *argumentatively* or by *inference* states the fact as to the value of the goods *unladen at the port or district where unladen*, is held to be equivalent to a direct and explicit averment to that effect. With these suggestions this exception is passed over.

The fifth exception is, that the libel does not allege that the "goods, etc., were landed at any *port or district* within the United States." That the libel does sufficiently state that the goods were *landed* at a district within the United States, is shown in the opinion on the third exception. But admitting that it appeared from the libel that the Active arrived within the limits of the United States, counsel for the claimant maintains that the allegation concerning the unloading of the goods does not show a delivery in contemplation of law from the vessel. The language of the act is—"shall be *unladen or delivered*"—and the allegation of the libel is equally explicit and comprehensive—"were unladen and delivered out of said steamship." Nothing plainer or more certain than this is necessary. It is true that the libel does not allege that the goods were unladen at any *port* within the United States or elsewhere. But it is not necessary that it should. It is sufficient if it appear that the unloading was at any place or district within the United States.

The Active.

The first exception is the mere general objection—"that said libel does not set forth facts sufficient to constitute a cause of action or forfeiture."

As a matter of form this exception is not well taken. It is a general objection, like a general demurrer at law, that the facts stated in the libel are not sufficient to cause a forfeiture. The libellant is not informed by the exception in what the insufficiency consists—what fact is lacking—and must wait until the hearing, to learn from the argument what the particular objection is, without any opportunity in the meantime to confess it, if well taken, or to meet it on the hearing by argument and authority. But for the purposes of this case, the exception may be considered sufficiently explicit. No objection has been made to it by the libellant. Besides, I remember that when this cause was before me for some purpose, I intimated to counsel for the claimant that this form of exception would be deemed sufficient. Upon this suggestion, hurriedly and inconsiderately made, the exception was doubtless drawn. Since then I have examined the elementary books on the subject, and I find the rule to be that an exception must state with reasonable certainty, the particular fact, matter, thing or omission relied on, as the case may be. With this rule reason and convenience concur.

Upon the argument of this exception, counsel for the claimant made the point, that the unlading described in the libel falls within section 27 of the Collection Act (1 Stat. 648), and not within section 50 thereof. Section 27 provides for a case where goods are unladen after the vessel has arrived within the limits of a collection district of the United States, or within four leagues of the coast thereof, and *before* she shall come to the proper place for the discharge of her cargo or some portion thereof, and be *there* duly authorized by the proper officers of the customs to unlade the same. The punishment prescribed for a violation of this section is a forfeiture of the goods so unladen, and a penalty of \$1,000 against the master and the mate of the vessel; but the vessel itself is not forfeited.

The Active.

The facts stated in the libel bring the case exactly within the terms of section 27; and the same may be said as to section 50, which provides, "That no goods, etc., brought in any ship or vessel from any foreign port or place, shall be unladen or delivered from such ship or vessel, *within the United States*, but in open day, * * * except by special special license, * * * nor at any time without a permit * * * for such unloading or delivery." The punishment prescribed for a violation of this section includes the forfeiture of the vessel "when the goods *at the port or district* where landed are of the value of \$400." Did Congress intend that section 50 should be cumulative, or only to apply to the subject after the vessel had arrived at a port? Ought the two sections be construed so that the first one should apply exclusively to all illegal unloadings prior to the vessels arriving at a port, and the second one exclusively thereafter. The case turns upon the determination of this question.

If section 50 is to have effect according to the natural meaning of its terms, then it overlaps section 27, and covers all cases of illegal unloading *within the United States*, and therefore the Active would be subject to forfeiture. But, if this section is to be restrained by construction, to an unloading which takes place after a vessel arrives at some *port*, upon the presumption that Congress did not intend it to be cumulative and thus impose additional and different punishments for the same offence, then this case comes within section 27 alone, and the Active is not subject to forfeiture for the illegal unloading complained of.

Of the authorities cited on the argument only one is directly in point, and that is *The Hunter* (1 Pet. C. C. 10.) In that case the libel alleged that the vessel "being bound from a foreign port to the United States, after her arrival within the limits of the United States, and before she had come to the proper place for the discharge of her cargo or any portion thereof, and before she was authorized to do so by the proper officer of the customs, did unlade six puncheons of distilled spirits, which were landed at a place

The Active.

within the jurisdiction of the Court, without a permit," etc. In the District Court, the facts being found to be as alleged, sentence of condemnation passed against the vessel. On appeal to the Circuit Court the decree was reversed, on the ground that the case fell within section 27, and that while it was also within the letter of section 50, it did not come within the purpose or intention of such section.

Mr. Justice Washington delivered the opinion of the Court, and in the course of it he says: "Does section 50 meet the case laid in the libel, or refer to a vessel after her arrival at her port of discharge? The words are certainly general and broad enough, because it is stated that *The Hunter* had arrived within the United States.

But ought not the law to be so restrained in its construction as to apply only to vessels in port? If it be not restrained, then there are two sections of the same law, on the same subject, giving double penalties for the same offence, viz: \$1,000 under section 27, and \$400 under section 50. The legislature may certainly do this if they please, but it is very improbable that such should be their intention. The law is then open to construction.

The whole of this law previous to section 30, relates to vessels before their arrival in port, and it is clear that section 27 applies to them only in that situation. Section 30 considers them as arrived, and from that to section 49, the act regulates the conduct of the master, and the officers of the government, as to the steps preliminary to the last act to be done, viz: the permit to land the cargo. Section 49 states that the duties being paid or secured, the proper officer is authorized to grant a permit to land the cargo, which had before been reported or entered. Immediately after, and in its proper place, follows section 50, inflicting a penalty on the master and a forfeiture of the goods unladed without such permit or special license.

Now, this permit cannot be granted unless a vessel has arrived at her port, nor until the previous steps required by law have been taken. * * * Section 50, then, which constitutes the crime of landing without a permit, must ne-

The Active.

cessarily be confined to a landing after the vessel has reached her port of discharge, because to obtain a permit she must be in port."

The case of *The Hunter* is the only direct adjudication of this question that I am aware of, and the opinion of the Court contains all that can be urged in support of the defence of the claimant in this case.

Some expressions in the opinion of Mr. Justice Story in *The Industry* (1 Gall. 114), decided in 1812—six years after *The Hunter*—are in conflict with the construction given to section 50 in that case. The case was this—The *Industry* being bound from Havana to New York, put in to the port of Edgartown, in Martha's Vineyard, in the district of Mass. While lying there, goods exceeding \$400 in value, were unladen in the night from the vessel, without a permit, and put on board the brig *Hannah*, then lying at the same port and bound to Boston. *The Industry* was seized and libeled as forfeited under section 50. In the District Court a decree of condemnation passed, from which an appeal was taken to the Circuit Court where the sentence of condemnation was affirmed.

The material difference in the facts in the case of *The Industry* and the one before the Court is this: In the latter the illegal unloading took place after the vessel had come within the limits of the United States, but before she had arrived at *any* port therein, while in the former such unloading took place after the arrival of the vessel at a port within the United States, although not her port of destination and discharge.

The question before the Court was, should section 50 be so construed as to apply to an unloading at *any* port within the United States, or only at such port as might appear to be the port of ultimate destination and discharge. The Court held that the case was within the terms and purview of section 50—that such section covered *all* cases of illegal unloading at *any* port within the United States, whether such port was the port of final destination and discharge or not.

On the argument, it appears to have been maintained on

The Active.

behalf of *The Industry*, that the case fell within section 27, and therefore it ought not to be held to come within section 50, because that would be construing the act so as to inflict double and different punishments for the same offence.

In noticing this argument, Mr. Justice Story assumes for the sake of the argument, that his conclusion was equivalent to deciding that in some cases at least, sections 27 and 50 were cumulative—applied to the same act—but denies that such conclusion ought not to be maintained for that reason alone. He says: “Nro is it sufficient to authorize a Court to extract a case from the express prohibitions of one section of an act that already the same offence is punished by a different penalty in another section. If the wording of both sections clearly embrace the same case, which is to be held nugatory? I know of no principle of law that would enable me to reject either. If, therefore, it should be proved that section 50 might embrace some cases (for clearly it cannot reach all), within the prohibitions of section 27, I am not aware how I would get over the express language. I should be obliged to hold the forfeitures cumulative in such cases, unless the legislature had enabled me, by direct or constructive exceptions, to escape from such a conclusion.”

But how far, if at all, these sections are cumulative, the Court did not expressly decide. The decision of the case turned rather upon the question whether the word *port* in section 50 should be construed to include *any port* within the United States at which an illegal unlading might take place, although the same was not the port of final destination or discharge.

The Court in *The Industry* not only maintains what the Court in *The Hunter* admits, that the legislature may impose cumulative penalties upon the same act or offence, but goes farther, and, as I think, correctly, and asserts that a Court is not authorized to presume that cumulative penalties were not intended by the legislature against the express words of the statute to that effect.

The Active.

If, upon a consideration of the act, it satisfactorily appeared that both these sections necessarily applied to an illegal unloading within the United States, before arriving at the port of discharge and obtaining a permit, as in this case, it would be the duty of the Court to enforce the law as it found it, without seeking to lengthen or shorten it by an arbitrary construction, founded upon fanciful conjectures as to what the legislature may have intended, or reasons of public policy or ideas of abstract justice.

As has been shown, section 50, by its terms, expressly includes this case which is also provided for in section 27, and the act contains no "direct exception," limiting or qualifying the force or effect of these terms.

In the reason of the thing, is there to be found what in the case of *The Industry* the Court denominated a "constructive exception" to the apparent intention of congress to make these sections cumulative?

The arguments drawn from matters extraneous to the words of the statute, for and against this exception—such as public policy, the object intended to be accomplished, the impropriety of double punishments, and the like, are pretty evenly balanced.

The object of these and other sections of the act is to prevent frauds upon the revenue. The remedy should be broad enough to meet all cases within the mischief intended to be guarded against.

Now, it is manifest, that by fixing a certain point in the voyage—as a *port*—where the force of section 27 is to absolutely terminate, and that of 50 only to begin, it will sometimes be so difficult to determine under which of these sections an illegal unloading should be punished, that no punishment whatever would be inflicted. When a vessel has reached a port and where she is just without it, as a matter of fact, is not always susceptible of certain proof. Astoria is near twelve miles from the bar of the Columbia river, but how far the *port* extends from the wharf or usual anchorage abreast of the village, is uncertain. Indeed it may be said that as section 27 first applies to a vessel arriving within the

The Active.

limits of the United States, it does not cease to apply until she is not only in fact in *a port*, but also at the proper place for the discharge of her cargo, and has a permit so to do. The language of the section appears to be to such in effect. But if section 50 does not apply until this point in the progress of the vessel is reached, then there is nothing left for it to apply to, for there is no prohibition against unlading after a permit for that purpose, unless it be in the night season, for which a special license is necessary.

If these sections are to be construed as not cumulative, which is to be allowed to operate according to the ordinary signification of its terms, and which is to be restrained or shortened so as to apply only to the cases not covered by the other?

The only consideration in favor of giving to section 27 the unrestrained operation, is the fact that in the nature of things it first applies to the subject—meeting the vessel as it does four leagues beyond the coast. But by its terms it follows the vessel until she has reached a port of discharge and obtained a permit to land her cargo. After this, as has been shown, there is practically nothing left for section 50 to apply to, and unless section 27 be restrained in some degree, the former is construed out of the statute. It follows that section 27 must be confined to cases of illegal unlading occurring between the shore line and a point four leagues at sea, or that these two sections overlap between such line and the port of discharge, or that section 50 does not apply at all—is excluded by section 27.

The matter standing thus I feel constrained to follow the authority of *The Hunter*, which is the only direct adjudication upon the question within my knowledge. That case was in all respects parallel to this—an illegal unlading *within the limits* of the United States, and *before* arrival at any port within such limits, and the Court decided that it fell within the provisions of section 27 and not 50.

The expressions of opinion in the later cases referred to *The Industry*, (1 Gall. 113); *The Betsey* (1 Mas. 354); *The Harmony* (1 Gall. 123), I think are against the soundness of

The Eldridge.

that decision. But these cases were not similar to this upon the facts, and do not expressly decide the question here involved. Such expressions must be considered as only the *dicta* of the learned judges, made in the course of argument, and therefore not authoritative and binding precedents.

.. Decree, that the libel be dismissed; and an order that a certificate of reasonable cause of seizure be allowed.

The facts being insufficient to cause a forfeiture according to the decision of the Court this order is not granted on account of reasonable cause *in fact*, but the seizure being within the letter of the act, it is a case wherein a certificate ought to be granted on account of the doubt in the law. (*United States v. Riddle*, 5 Cranch, 311; *The Friendship*, 1 Gall. 111.)

Joseph N. Dolph, for libellant.

David Logan, for claimant.

DISTRICT COURT, JULY 6, 1866.

THE ELDRIDGE.

The Pilot Act of the territory of Washington—January 26, 1863—authorized certain pilots to take charge of vessels bound in or out of the Columbia river, provided such pilot “shall first show the master his warrant:” Held, that the exhibition of the warrant to the master was a necessary part of the tender of services, and unless the same was expressly waived, or intentionally prevented or avoided by the master, the pilot could not recover for such tender of services.

DEADY, J. The libel in this cause was filed January 11, 1865, and states that on or about August 24, 1865, the bark Eldridge, with Joseph Williams as master, being on a voyage from the Sandwich Islands to the port of Portland, crossed the bar at the mouth of the Columbia river; that at the date aforesaid, the libellant was a duly commissioned pilot of said bar, under and virtue of an appointment of the pilot commissioners of the territory of Washington; and at the

The Eldridge.

time said bark approached the bar, that the libellant then being in the steamtug Raboni, hailed the bark and offered to pilot her over the bar, but the master refused to recognize the libellant as a pilot or permit him to pilot the bark over the bar. On account of this tender of services and refusal, this suit is brought to recover the sum of one hundred dollars, the amount of full pilotage.

The claimant, John McCracken, excepts to the sufficiency of the libel, because it does not aver that the libellant exhibited his warrant to the master, before offering to pilot the bark.

The law under which the libellant seeks to recover, was passed by the legislature of the territory of Washington, January 26, 1863. The provision upon which this exception is based is contained in section 3 of the act: "Every such branch pilot is authorized and directed, by himself or his deputy, to take charge of any vessel requiring his services, bound in or out of the Columbia river, or Shoalwater bay, *but shall first show the master his warrant.*" Section 7 provides that no vessel shall be compelled to take a pilot, but vessels over one hundred tons burthen shall be liable to pay half pilotage, in and out, to the first pilot offering his services, but if the master requires the services of a pilot, in any case, the pilot shall take charge of the vessel, "first exhibiting his authority."

The libel does not aver that the libellant exhibited his authority—showed the master his warrant, at the time of hailing the bark, and tendering his services as pilot. The allegations of the libel are only to the effect that at the time the libellant was duly authorized and qualified to take charge of the bark as pilot, and that the master refused to recognize him as such pilot and receive the tender of his service.

Counsel for the libellant cites *Commonwealth v. Ricketson* (5 Met. 426), in support of the libel. In that case the Court held that it was not necessary, in establishing the tender of services on the part of the pilot, to even show that he had his warrant with him at the time. But the statute of Massachusetts only directed the pilot to first show his warrant

The Eldridge.

if required. The Pilot Act of Oregon agrees with that of Massachusetts in this respect—the pilot not being bound to show his warrant *unless required*. But the Washington act is peculiar in this respect, and if construed literally, it might often be impossible for a pilot to make sufficient tender of his services, if the master of the vessel desired to prevent him. It would only be necessary to keep away when hailed, so that the pilot could not show his warrant, and the tender of service would be insufficient. This would allow the master to take advantage of his own wrong. I think the statute is open to this construction at least, that the pilot ought to be excused from actually exhibiting his warrant, if he was prevented from so doing by the wrongful conduct of the master. It is the duty of a vessel when on pilot ground, to so conduct herself as to enable the pilot to make a proper tender of his services, in the cases provided for by statute. But the statute cannot be construed out of existence. The master is not bound to require the production of the warrant, and if he allows the pilot a reasonable opportunity to exhibit it, and the latter fails to do so, I think he must take the consequences of his neglect or omission. The duty of demanding the production of the warrant not being devolved upon the master, his omission to do so is not a waiver on his part of anything. The tender of service on the part of the pilot, to be sufficient must include the exhibition of his warrant, unless prevented from so doing by the wrongful act of the master.

The right of the libellant to recover pilotage in this case, rests upon a sufficient tender of his services as pilot on the occasion in question. And, unless the libel shows by direct and plain averment that such a tender was made, or a valid reason why it was not made, it is insufficient; it does not show a right to recover. The tender is in the nature of a condition precedent to the right to recover, and the libel must aver performance of it. The libellant might have been a qualified pilot, and hailed the bark as alleged; but it does not follow from this that he showed his warrant to the mas-

The Oregon.

ter, and unless he did, these acts were not sufficient to entitle him to pilotage. The exception is sustained.

Decree, that the libel be dismissed, and that the claimant recover his costs and disbursements.

Joseph N. Dolph, for libellant.

Amory H. Holbrook, for claimant.

DISTRICT COURT, JULY 7, 1866.

THE OREGON.

Where an ocean steamer is making regular voyages to a port, and for any reason she is unable to reach such port, and the agent of her owner charts a steamboat to take the passengers and freight down a river to such steamer and bring back her cargo, a delivery of goods under such circumstances to the steamboat for the purpose of being conveyed by such steamer, is a delivery to the latter, and she is thenceforth bound for their safe carriage and timely delivery.

Where a vessel is discharging and taking on cargo at a wharf, a delivery of goods thereon by the direction of the master, for the purpose of carriage upon the same, is a delivery to such vessel, and her responsibility for the carriage and delivery thereof commences from that time.*

DEADY, J. The libel in this suit was filed January 30, 1866, and alleges, that about January 28, 1865, the libellant, M. Mansfield, shipped a package containing furniture and clothing of the value of \$1,172, on the steamship Oregon, at the port of Astoria in Oregon, to be delivered at San Francisco, California, in good condition—the perils of the sea excepted—and that by the negligence and misconduct of the master and his servants, the package was wholly lost.

On April 3, John McCracken, as agent for the claimant, Ben. Holladay, answered the libel, denying that the package in question was ever delivered to the steamship or received by it or its officers; as also the value and quality of

*Affirmed on appeal to the Circuit Court, September 13, 1867.—*Field, J.*

The Oregon.

the goods alleged to have been in it. The answer also attempts to deny that any contract was made between the libellant and the master of the Oregon for the conveyance of this package from Astoria to San Francisco.

But the language of the answer in this respect is wholly irrelevant to the charge in the libel, and does not controvert any allegation therein. It is as follows: "That the said steamship Oregon, whereof Francis Connor was master, neither on January 28, nor at any other time, made a contract with the master of said steamship, whereby *he* agreed in consideration," etc. As will be seen, this only denies a contract between the *vessel and her master*—a matter not alleged by the libellant, and with which he has no concern, let the fact be as it may.

For the purposes of this suit, the answer must be construed to admit the contract as alleged in the libel. Besides, if it is found that the vessel received the package under the circumstances stated, the law will imply the contract to convey and deliver as alleged.

The facts in the case I find to be as follows :

I. That in January, 1865, the steamship Oregon was engaged in carrying passengers between Portland and San Francisco, and in the latter part of that month was expected to arrive at Portland, but ice being then in the river it was uncertain whether she would come up or not, and therefore McCracken, the resident agent of the vessel, employed the river steamboat Cascades to take the passengers and freight then at Portland, by the Wallamet slough to the steamship at St. Helen, or wherever she should be found between there and Astoria, and bring up the Portland freight and passengers then on the Oregon; and that there was some doubt whether the Cascades would be able to get through to the steamship, in which event it was agreed between the agent and the shippers that the Cascades would return to Portland, and the latter must pay the expense of the attempted trip, but if she should reach the Oregon, then the former would pay the Cascades her bill for lighterage and charge it over upon the freight.

The Oregon.

II. That the libellant was then in San Francisco, but his family were in Portland, where he had lived for several years, and that such family took passage on the Cascades for the Oregon, and at the same time B. L. Norden, the agent of libellant, shipped thereon thirty-one packages of merchandise marked diamond M, S. F., for which the purser of the Cascades gave him a receipt, specifying that they were "in good order" and at "shipper's risk and expense;" and that such packages contained household stuff, and were shipped as freight.

III. That the Cascades met the steamship a short distance below St. Helen, and the master of the latter being in doubt about the ability of reaching St. Helen with his vessel, directed both vessels to proceed to Astoria,¹ because that was the only place below St. Helen at which there was a wharf, whereon to transfer the respective cargoes of the Cascades and Oregon.

IV. That the wharf at Astoria was in charge of a third party, and had a small warehouse upon it, and the Cascades and Oregon arrived there in company on the afternoon of January 26; that the former discharged her freight upon the wharf, from whence it was passed through the warehouse to the steamship on the other side; that the steamship at first discharged her cargo upon the wharf also, but as soon as the Cascades was discharged she laid alongside the Oregon and received the freight of the latter directly on her deck; that the transfer of cargo continued through two nights and until January 28, when the Cascades returned to Portland and the steamship went to sea; and that no receipt was given by the Oregon to the agent of the libellant who accompanied his family to Astoria, nor to any other of the individual shippers, but one receipt was given to the Cascades for the whole number of packages according to the freight list of the latter.

V. That on February 2, the San Francisco agent of the steamship gave libellant a receipt for the freight and light-erage of his packages, and described them therein as thirty-one in number; but subsequently, on March 2, such agent

The Oregon.

endorsed on such receipt the return of \$4.50 of such freight to the libellant, because as therein asserted, one of the packages had not been delivered.

VI. That among the thirty-one packages shipped on the Cascade for the Oregon, and marked diamond M, was the package described in the libel, containing the articles of household furniture and wearing apparel therein described; that such package was the one not delivered to the libellant by the steamship at San Francisco; and that the contents thereof were of the value of \$1,172.00.

In considering the question of the liability of the vessel for the missing package, I will first endeavor to ascertain the effect of the shipment on the Cascades.

The rule insisted upon by the claimant that the vessel is not liable until the *receipt* of the goods, is of course admitted. But cargo may be *received* within the meaning of this rule before it is actually on deck.

“The reception of the goods by the master on board the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owner or master, binds the ship to the safe carriage and delivery of the goods.” (1 Par. M. L. 132.) “The manner of taking the goods on board, and the commencement of the master’s duty in this respect, depend on the custom of the particular place. More or less is done by the wharfingers or lightermen according to the usage. If the master receive the goods at the quay or beach, or *send his boat for them*, his responsibility commences with the receipt.” (Conk. Ad. 151.) Upon the facts of this case, I am of the opinion that the receipt of the goods by the Cascades was the receipt of them by the vessel, so as to bind her for their safe carriage and timely delivery, provided the Cascades was able to reach her. McCracken was the agent of the owner, and he chartered the Cascades as a lighter to take the freight to and from the Oregon. In legal effect this is the same as the master’s sending his boat for the goods. In this respect the owner represented by

The Oregon.

McCraken has as much authority in the premises as the master.

That this was the understanding of all the parties at the time, is evidenced by the fact, that the vessel did not receipt separately for the goods to the individual shippers, but in gross to the Cascades, and also by the fact that the vessel paid the Cascades her bill and charged it over to the shippers as *lighterage*. The Cascades was treated by the master of the vessel as a lighter or boat in his employ. From the time of the meeting below St. Helen, the master of the Oregon controlled the movements of the Cascades, and instead of receiving the goods alongside in the river as was expected and given out when the latter left Portland, required her to proceed in company with the Oregon to Astoria for the convenience of the wharf. The cases of *The Freeman* (18 How. 182), and *The Yankee Blade* (19 How. 82), cited by counsel for claimant, are not in point.

But admitting for the moment that the delivery to the Cascades was not a delivery to the Oregon, was the missing package delivered from the former to the latter, at Astoria?

There can be no doubt that the package was delivered to and received on the Cascades at Portland. Counsel for the claimant admit this, but insist that it was lost before it came to the Oregon, and that the latter is not responsible for such loss. There is no direct and explicit evidence that the package was discharged upon the wharf at Astoria, yet the inference from all the facts of the case is irresistible that it was. I am morally certain of it.

Such a discharge was a delivery to the vessel. The Cascades, in any view of the matter, was not engaged in an independent voyage, but was attendant upon the Oregon. The Oregon was her destination down stream; and she went to this Astoria wharf under the direction and orders of the master of the vessel, as a convenient place for the vessel to receive this freight and deliver her upward-bound cargo. It was not convenient—perhaps not possible—for the vessel to receive this freight at once upon her decks. She must first *discharge* cargo. Therefore it was delivered to her upon

The Oregon.

the wharf. This was a delivery in the immediate vicinity of the vessel and in the presence of its officers; not only that, but at the place appointed by the master to receive the goods.

In addition to this, Hoyt, the purser of the *Cascades*, testifies positively that the vessel receipted for the whole cargo of the former, package by package, and that such receipt corresponded with the freight list of the *Cascades*, from which the receipt given the libellant's agent, was prepared. This fact itself is primary evidence of a delivery to the Oregon. The whole includes all its parts, and a receipt of the whole of the cargo of the *Cascades*, includes the package in question, which is shown to have been upon her freight list, and delivered to her at Portland. True, this receipt may be incorrect in this respect, but the presumption is otherwise, and the burden of proof is upon the claimant to show wherein it is false, if at all. The only evidence opposed to this is the testimony of two or three officers of the vessel, who, on being interrogated upon the subject at this late day, answer that they do not *now* remember to have seen such a package put on board the Oregon. Mere negative testimony like this, is of little or no weight against well established facts or reasonable deductions therefrom. Besides the right of the libellant to recover, does not depend upon the fact of whether the package was actually put on board the vessel or not. From the time of its delivery upon the wharf at Astoria, it was delivered to the vessel. If, thereafter, it was left upon the wharf, or stolen therefrom, or dropped in the river while the freight was being handled, during the night, as is quite likely, the vessel would be liable to the libellant for the loss.

Upon the question of the value of this package, the libellant and his wife, are the only witnesses who have any direct knowledge. The goods contained in it, are alleged to have been of a fine quality and superior workmanship, such as are commonly used and worn by people of refined taste, and comparative wealth. It appears that some eight years ago the libellant lived in New York, and was in good cir-

The Oregon.

cumstances. His subsequent failure would not affect the quality or quantity of his wife's clothing, owned by her before that time, but might induce her to preserve it with extraordinary care—at least such valuable articles as figured silk dresses, a velvet cloak and fine shawl. One of the claimant's witnesses testifies, that the wife of the libellant dealt with him some years in Portland, for dress and household goods, and that she always purchased the best article in the market.

Nor do I think that damages for the loss of costly wearing apparel, are to be measured by what such articles might bring at auction, as mere second-hand clothing. What they were worth to the libellant and his family, and what it would cost to replace them, ought also to be considered. It must also be borne in mind that the claimant has the legal right to satisfy any decree which the libellant may obtain for the non-delivery of this package in legal tender notes, and that as he seriously contests this claim, he will most probably satisfy such decree in that kind of lawful money which has the least commercial value. The libellant is entitled to recover the value of the goods, as set forth in his libel, with interest, at the rate of ten per centum on that amount, from the time of the non-delivery.

Decree, that the libellant recover \$1,342.62½, with costs and disbursements of suit.

Lansing Stout, for libellant.

William W. Page, for claimant.

The United States v. Solomon Dodge.

DISTRICT COURT, NOVEMBER 7, 1866.

THE UNITED STATES v. SOLOMON DODGE.

A sale of spirituous liquors, without a license therefor first obtained, is a violation of section 73 of the act of June 30, 1864 (13 Stat. 249), although the party making such sale intended at the time to give the proceeds thereof to the sanitary commission or other charitable use.

Reputation is competent proof of the name of a person, place or house; and, therefore, upon the trial of an indictment against one Dodge for selling liquor without license, the government was allowed to prove that the house where the witness bought the liquor was called *Dodge's*, and that the name of the man who kept it was called *Dodge*.

Power and duty of a jury in judging of the credibility of witnesses, and the value or effect of evidence.

This was an indictment found under section 73 of the act of June 30, 1864 (13 Stat. 249), commonly called the Internal Revenue Act. It charged the defendant with selling liquor at retail without a license therefor, between July 12 and September 15, 1845, at Yaquina bay, in the district of Oregon. The plea was "not guilty." On the trial, it was admitted that between the dates aforesaid, or since, the defendant was not licensed to retail liquor. From the evidence it appeared that he was the proprietor and occupant of a house in the village of Oysterville, on the waters of Yaquina bay, where he was in the habit of entertaining travelers with board and lodging; that he kept spirituous liquors in his house and furnished them to his guests and others, by the drink or bottle, without any direct charge therefor, but that such guests and others at the suggestion of the defendant, deposited the value of such liquor in money in a box kept on the mantelpiece with a hole cut in the lid of it, and called by the defendant "the sanitary box." There was no evidence tending to show that the moneys so deposited were ever in fact applied by the defendant to any use other than his own. The Court charged the jury as follows:

DEADY, J. Gentlemen of the jury: The Internal Revenue Act of June 30, 1864, provides: Section 71. "That no person, firm, company or corporation, *shall be engaged in, prosecute or carry on any trade, business or profession hereinafter*

The United States v. Solomon Dodge.

mentioned or described, until he or they shall have obtained a license therefor in the manner hereinafter provided."

Section 72 prescribes the mode of obtaining such license, and devolves upon the person requiring it the duty of applying therefor, and furnishing the proper officer the necessary information to enable him to issue the same, and also to pay the tax thereon.

Section 73. "That if any person or persons *shall exercise or carry on* any trade, business, or profession, or *do any act* hereinafter mentioned, for the exercising, carrying on, or doing of which trade, business or profession, a license is required by this act, without taking out such license, as in that behalf required, he, she, or they shall, for every such offence, besides being liable for the payment of the tax, be subject to imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both."

Section 73 defines the crime with which the defendant is accused, and prescribes the punishment therefor. It consists in the *exercising or carrying on* the business of a retail liquor dealer. Section 79 of the act, subdivision 5, defines the business of a retail liquor dealer, as follows: "Every person who *shall sell, or offer for sale* foreign or domestic spirits * * * in quantities of three gallons or less, * * * shall be regarded as a retail dealer in liquors under this act."

If the evidence satisfies you that the defendant, between the dates charged in the indictment, was engaged in the business of retailing liquor, within the terms of this definition, you should find him guilty, otherwise not. Proof of a *single act* of selling or offering for sale, is sufficient to constitute the crime, and warrant a conviction.

The object of Section 73, is to punish persons who do or attempt to defraud the revenue of the United States in this particular, and unless it is honestly and impartially enforced by courts and juries, the government is cheated, and gross injustice is done to all honest people, who pay their taxes fairly and promptly.

Proof that the defendant was *engaged* in the business of a

retail liquor dealer, may arise from circumstances, other than a particular instance, of selling or offering to sell. A person is *engaged in a business* within the meaning of the act, when he has the means to do so at his command, and holds himself out to the world, or the public in that capacity, or is ready or offers to do a particular act, constituting such business. If he should not succeed in securing custom or making sales, this fact is not an excuse for having engaged in the business without a license. The license must be first obtained, and then, and not before, the party is at liberty to sell or *offer* for sale, liquor in less quantities than three gallons. The liquor may be offered for sale without a special or personal solicitation of any particular person to become a purchaser. It may be done by general advertisements in the press, or by the exhibition of signs or symbols in the vicinity of the place of the alleged business, or by having the article on sale, with intent to dispose of it to any one offering to purchase.

Counsel for the defendant ask the Court to instruct you, as a matter of law, that if the money recovered by the defendant for liquor, was honestly intended by him for the use of the Sanitary Commission, that he cannot be convicted.

I hardly suppose counsel is in earnest in making this proposition. But be that as it may, I decline to give the instruction. The delivery or furnishing of liquor by the defendant to any one with the intent on his part to obtain and receive a compensation therefor, directly or indirectly, constitutes a violation of section 73 of the act; and any ulterior purpose, whether real or pretended, to bestow the money or compensation so obtained upon any person or object of charity, or otherwise, does not affect the character of the transaction or purge the defendant of the guilt incurred by such unlicensed traffic. As well argue that it is justifiable to cheat or steal generally for the benefit of the Sanitary Commission. The old maxim applies—"Be just before you are generous." However, upon the facts known to the Court, this "Sanitary-box" appears to be a mere dishonest device to avoid the payment of the tax, and not a

The United States v. Solomon Dodge.

very ingenious one. It is a matter of history that the Confederate army under Lee surrendered to Grant on April 9, 1865. Practically, the civil war then terminated, and with it the collections for the Sanitary Commission. Such being the case, judge you if it is not absurd now to claim that the defendant was retailing liquor at the remote and insignificant village of Oysterville, on the coast of Oregon, without a license, in the month of September, 1865, for the benefit of the sick and wounded of the army of the Republic.

Besides, before the defendant is excused upon this ground, in common honesty, he ought to show that he has paid over the money made or received to the commission. Nothing of the kind has been attempted, and you are therefore warranted in concluding that this defence is untrue in fact as well as insufficient in law.

A witness has been allowed to testify before you that the house in Oysterville, where he obtained liquor, was on one occasion "called Dodge's." Counsel for the defendant objected to the introduction of this evidence on the ground that it was hearsay. Not satisfied with the ruling of the Court, counsel appeals to you in somewhat extravagant terms, to disregard it as incompetent. I suppose you are aware, if counsel is not, that it is the province of the Court to decide what evidence is competent and relevant; and not that of the jury. In the heat of argument and from a desire of victory, counsel sometimes make extravagant assertions before juries, for which they are hardly accountable, and to which you should give no heed.

The testimony of the witness has been allowed by the Court to be offered to you as competent, and it is your duty so to receive and consider it as such. The house "was called Dodge's," and the man who dealt out the liquor "was called Dodge"—in other words, the *house*, and the *man* who kept it, had the reputation in that vicinity of being named Dodge. Reputation or hearsay is competent proof of the name of a person, place or house. But the effect or value of this evidence upon the point in controversy—whether the witness got his liquor from the defendant or at a place un-

der his control—is for you to determine. And so it is with all the evidence in the case. The degree of credit to be given to the testimony of the witnesses, and the inferences, if any, to be made from the facts proven, are matters within your province to determine. Yet your power in this respect is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence. Your oath to decide according to the *law* and evidence given you in Court, obliges you to do this. And it is the duty of the Court to make such suggestions to you in this respect as it conceives proper under the circumstances of the case.

It is not contended that any of the witnesses have deliberately stated what is untrue. The presumption of law is that a witness testifies truly, and you are to act upon this presumption until it is overcome by the evidence or circumstances of the case. The witnesses, so far as appears, are persons without any grudge against the defendant, and having no special or personal interest in his conviction. From the fact that it appears they obtained liquor at his house for their own convenience, they may be reluctant to testify against the defendant, and thus be the means of his being punished for that act. Such feelings are natural, and have their foundation in a generous sentiment, but you should bear in mind that they may lead a witness to, unconsciously or otherwise, state the facts concerning which he is interrogated as favorably for the defendant as he can, without telling a deliberate falsehood. As in this case, a witness upon his examination in chief, may state a fact against the defendant positively, and upon cross-examination, at the suggestion of counsel for defence be very ready to cast doubt upon such statement, by admitting the *possibility* of his being mistaken in regard to some important circumstance connected therewith. Considering the relation which the witnesses called by the government appear to sustain to the defendant, it is fair to infer that their testimony is as favorable to him as their consciences would permit. Subject to these suggestions and your oaths, you are to judge

The United States v. Solomon Dodge.

of the credibility of the witnesses and the value of their evidence, and find accordingly.

The law presumes that the defendant is innocent of the crime charged against him. The burden of proof is upon the government to overcome that presumption, and prove the charge as laid in the indictment beyond a reasonable doubt. A reasonable doubt is not a mere caprice, whim or possibility, but a doubt arising from the circumstances of the case, and founded upon a substantial reason. It is not required that the proof should amount to absolute certainty. Moral certainty is sufficient to authorize a verdict of guilty, and you are not to acquit the defendant because by some possibility or other he may not be guilty. If, upon a careful consideration of all the circumstances of the case, you are satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you should say so by your verdict, otherwise not.

The jury found the defendant guilty as charged in the indictment.

Judgment that the defendant pay a fine of \$50, and the costs of the action, taxed at \$76.26, and that in default thereof he be committed to the county jail at Multnomah county until the same was discharged, at the rate of one day for every \$2 of such fine and costs.

Joseph N. Dolph, for the plaintiff.

William M. Strong, for the defendant.

The Pacific.

DISTRICT COURT, NOVEMBER 17, 1866.

THE PACIFIC.

The Act of March 3, 1863, section 11 (12 Stat. 741), does not give District Attorneys a per centum on the amount of a judgment or decree obtained by them in favor of the United States, but only upon the sum actually collected or realized thereon.

The words "collected" and "realized," as used in said section, are substantially synonymous; and money is not "realized" by the United States within the meaning of the same, until it has received the same or the benefit of it.

Amount allowed District Attorney for attending an examination to procure remission of a forfeiture under section 50 of the Collection Act of March 2, 1799 (1 Stat. 665).

DEADY, J. The steamship Pacific was seized and libelled in this Court for a violation of section 50 of the Collection Act of March 2, 1799 (1 Stat. 665). The claimant—The California Steam Navigation Co.—appeared and obtained the delivery of the vessel upon giving bond for its appraised value, \$225,000. Upon the return day—March 15, 1865—the claimant having failed to answer the libel, this Court pronounced in favor of the forfeiture of the vessel, and gave a decree against the sureties in the claimant's bond for the appraised value thereof; and because it appeared that the claimant had instituted proceedings to procure the remission of the forfeiture, it was then ordered that the enforcement of such decree be stayed until the further order of the Court.

Now at this day, counsel for claimant moves to discharge such decree against the sureties, and in support thereof, produces and reads to the Court a warrant of remission from the Secretary of the Treasury, upon the conditions, among others, that the claimant pay all costs of Court in all proceedings touching said forfeiture, and such a per diem fee to the United States District Attorney for his actual attendance at the summary examination as this Court may direct.

The question is made on the argument—what is included in the phrase, "all the costs of the Court?" The District

The Pacific.

Attorney maintains that the case falls within the provision of section 11 of the act of March 3, 1863 (12 Stat. 741), which provides: "That there shall be taxed and paid to district attorneys two per centum upon all moneys *collected* or *realized* in any suit or proceeding arising under the revenue laws, conducted by them, in which the United States is a party;" and that such per centum shall be in lieu of all fees and costs allowed by the act regulating fees of February 26, 1853 (10 Stat. 161). Under the latter act the compensation of the District Attorney would be a docket fee of \$40, while under the former it would amount to \$4,500. The difference is a material one to both the attorney and the claimant.

The argument of the District Attorney assumes that the sum for which the decree was given was *realized* by the United States, because it was adjudged that they should recover it, and that it might have been actually *collected* at any time since, but for the order of this Court, made in the interest and at the instance of the claimant, staying the execution of the decree. It is also maintained that the attorney had earned this per centum when he had obtained the decree, and that the granting of the supersedeas during the time taken by claimant to procure a remission of the forfeiture ought not to be allowed to work to his prejudice.

However just the claim of the District Attorney, I cannot assent to his construction of the act of March 3, 1863.

This two per centum is only to be paid on "moneys collected or realized." Now, it is not pretended that this sum was ever "collected." But the terms "collected" and "realized" are used here as substantially synonymous. That which is *realized* by the United States is *collected* by it, and contrariwise. That which is *realized* is made certain, but it cannot be said that this money was certainly possessed or obtained by the United States before it was *collected* and while it rested in decree.

The object of the act is manifest. By offering this per centum to district attorneys, it is intended to stimulate them

to make the money on judgments and decrees in favor of the United States. Prior thereto such attorneys were only paid for bringing an action or suit for the United States and pursuing it to judgment or decree. No specific compensation was allowed for attending to the matter of enforcing such judgment or decree, and the result often was, what might reasonably have been predicted—the United States was “beaten on the execution.” This per centum is to be paid upon the moneys realized by the United States through the professional exertion and services of its attorney. But if for any reason no money is realized, then there is no fund upon which to compute it. It is in the nature of a fee contingent upon the collection of the money, and if the contingency does not happen, the right to the per centum never attaches, and the attorney’s compensation is limited to the docket fee allowed by the act of 1853 for prosecuting the proceeding to judgment or decree.

In my judgment the District Attorney is not entitled to tax this per centum against the United States in lieu of costs. If this conclusion be correct, it follows that the payment of such per centum cannot be exacted from the claimant under this warrant as a condition of the remission, because the phrase therein—“all costs of Court” only includes such costs as the United States are liable for. The costs made by the claimant are paid by it in any event.

True, it was in the power of the secretary, to impose upon the claimant more favorable terms for the District Attorney, but he has not seen proper to do so, and this Court has no power to revise his action in this respect.

I next consider the fee to be allowed the District Attorney for his services in connection with the proceedings to obtain a remission of the forfeiture. The extent and nature of these services, are within my personal knowledge. The cause was an important one to the government and the claimant. The amount involved was large, and the labor and responsibility devolved upon the District Attorney, by reason of the power and influence of the claimant, was ardu-

The Pacific.

ous and extraordinary. The claimant has had the influence to procure a remission of a forfeiture produced by a willful, if not a corrupt violation of law by its agents—the master and mate of the Pacific—upon the single ground that *it*—a corporation without body or soul—was not expressly consenting to such violation, and without other terms than the payment of this fee to the attorney—such a *per diem* fee as the Court may direct. Counsel for the claimant suggest that the *per diem* of district attorneys is fixed by the act of 1853, and that if this Court is not bound by that act in this instance, it ought to take it as a guide in fixing the amount to be allowed. But the warrant remits the amount of the *per diem* to the judgment of this Court. Now the *per diem* allowed by the act of 1853, is in addition to the fees earned by the attorney, during the progress of the same, while in this case the *per diem* to be allowed by the Court is the whole compensation of the District Attorney for the labor performed in the proceeding to obtain a remission. For prosecuting the suit for forfeiture to a decree, he is allowed the paltry fee of \$40 in currency, and that is all the compensation he obtains in this whole matter, aside from that which the Court is about to allow him.

Of course the Court ought not to exercise this power, so as in effect to forfeit the vessel, or any very considerable portion of its value to the District Attorney, and thereby nullify the action of the Secretary in making the remission. But at the same time, all the circumstances of the case considered, I prefer within reasonable limits, to err in favor of the District Attorney, rather than the claimant, and therefore, fix his *per diem* allowance at the sum of \$200.

Order, that the claimant pay the costs of Court, and pay the District Attorney the sum of \$200, within ten days from the entry hereof, and that thereupon, and upon the filing of the warrant of remission from the Secretary of the Treasury herein, the decree against the claimant, and his sureties, for the appraised value of said vessel be discharged, and held for naught; and that, in default thereof, execution

The Orizaba.

issue to enforce such decree, notwithstanding such warrant of remission.

Joseph N. Dolph, for libellant.

William M. Strong, for claimant.

THE ORIZABA.*

DEADY, J. The circumstances of this case are similar to those of *The Pacific*, just disposed of. Practically, they were argued and submitted together, and the same order is made in this as in that.

Joseph N. Dolph, for libellant.

William M. Strong, for claimant.

*See *The Pacific*, ante, 192.

Cardinel v. Smith.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT
OF CALIFORNIA.

CIRCUIT COURT, MARCH 14, 1867.

ADOLPH CARDINEL AND AUGUSTINE LUSULSKY v.
W. C. S. SMITH AND JEROME B. WALDEN.

Section 63 of the act of July 13, 1866 (14 Stat. 169), which provides that a person claiming goods which have been seized as forfeited under the Internal Revenue Act, must give bond to the collector for costs and expenses, etc., is not compulsory, and does not prevent the owner of goods which he alleges to have been seized unlawfully, for maintaining an action against the seizing officer for the damages occasioned by the trespass.

By section 70 of the act of July 13, 1866 (14 Stat. 173), it is in effect provided that canned goods in the hands of the manufacturer, on and after August 1, 1866, shall pay a duty; and by the same act (14 Stat. 144,) it is declared that a retail or other dealer in such goods, for all the purposes of taxation, "shall be deemed the manufacturer thereof;" while in schedule C, (14 Stat. 145), it is provided that such goods when "made, prepared, and sold or offered for sale or removal for consumption in the United States, on or after October 1, 1866," shall be liable to a stamp duty. *Held*, that a retail or other dealer who offered such goods for sale after August 1, 1866, was to be deemed and held the manufacturer thereof, and that such goods were liable to pay a duty, and if offered for sale without the payment thereof, were forfeited to the United States.

Where the intention of the legislature is in some particular ambiguously expressed, it is the duty of the Court so to construe its act so as to make it harmonize in such particular with the general purpose, plainly expressed. When an act (14 Stat. 144), declares that dealers in canned goods, under certain circumstances, "shall be deemed the manufacturers thereof," it is equivalent to declaring that such dealers shall be treated and held liable as if they were manufacturers, notwithstanding they are not such in fact.

This action was tried by the Court, without the intervention of a jury. It was brought against the defendants for taking and carrying away certain canned meats, fruits, etc., alleged to be the goods of the plaintiffs, in the District Court of the State for the Seventh Judicial District, and by the defendants removed to the United States Circuit Court, under section 67 of the act of July 13, 1866 (14 Stat. 171.) The facts of the case are sufficiently stated in the opinion of the Court.

DEADY, J. In making the seizure and sale complained of, the defendants acted in their official capacity—Smith as collector of internal revenue for the fifth district of California, and Walden as constable of Napa township—and upon the assumption and claim on their parts, that the goods seized were liable to pay a duty as provided in schedule C of the act aforesaid, and were forfeited to the United States on account of having been exposed to sale by plaintiffs without the duty thereon having been paid by affixing the proper stamps thereon.

It is insisted on behalf of the defendants that this action cannot be maintained, even if the seizure was wrongful, because the plaintiffs, it is said, are confined to the remedy provided or allowed by section 63 of the act of July 13, 1866 (14 Stat. 169). This section allows any person, who may claim goods that have been seized as forfeited to the United States, under the Internal Revenue Act, to file a bond with the collector for costs and expenses, and thereupon the collector must give notice of his proceedings to the district attorney, who must proceed to have the alleged forfeiture adjudicated in the proper Court.

But this provision is neither compulsory nor exclusive, and does not prevent the claimant from adopting and pursuing any other existing remedy. Indeed, section 63 aforesaid, is primarily intended to govern the conduct of the collector in the disposition of goods seized as forfeited to the United States, and in no way affects his liability to an action by the party aggrieved in case of an unlawful seizure. At common law any officer, including a sheriff acting under process, who seized goods of another by mistake or otherwise without sufficient authority, was liable to an action of trespass therefor.

True, Congress, for the purpose of preventing officers of the customs from being harassed by actions for vindictive damages, has provided that where the property seized, has been adjudged to the claimant as not liable to seizure, if the Court certifies that there was probable cause for the arrest, no action can be maintained therefor. The claimant is re-

stored to his property by the judgment of the Court, but the fact, judicially ascertained, that there was probable cause for the taking and detention, is made a bar to an action for damages for the mere detention of the property.

But in regard to these goods, there has been no proceeding *in rem* to determine their liability to seizure as forfeited to the United States. The plaintiffs' goods have been taken from them by the defendants, and the former, instead of claiming them, giving surety for costs, and thereby taking the case into Court upon the naked question of forfeiture, have seen proper to abandon the goods and sue the defendants in trespass for the value thereof. Unless, then, the taking or seizure was lawful, the defendants must respond in damages to the extent of the value of the goods, and look to the government, which has had the benefit of the seizure, to reimburse them. Assuming that the seizure was unlawful as alleged, the plaintiffs have not mistaken their remedy, and may maintain this action.

The only remaining question in the case is, were these goods, at the time they were offered and exposed for sale, liable to pay a duty? If they were, they were forfeited to the United States and the seizure was lawful, otherwise not.

Schedule C, as amended by section 9 of the act of July 13, 1866 (14 Stat. 145), declares, that such goods as these when "made, prepared and sold or offered for sale, or removed for consumption in the United States, on and after the first day of October, 1866," shall be liable to a stamp duty. The plaintiffs purchased these goods before October 1, 1866, and afterwards offered them for sale. The seizure was made on October 22. This being so, of course they were "made and prepared" before October 1.

It is insisted by the plaintiffs that this provision of the act should be read so as to declare that these goods, whether *sold* or *offered* for sale, or removed for consumption, etc., after October 1, should also be made and prepared—manufactured after that date. I think this proposition reasonable and grammatical, and so far as this clause of the statute is concerned, settles the question in favor of the plaintiffs.

Cardinel v. Smith.

The alternative is only applied to the *selling, offering* for sale or *removing* for consumption after October 1, but in either case the goods so sold, offered or removed, to be liable to the duty, must have been "made and prepared" after said date. But this is not all.

Said section 9 also provides (14 Stat. 144), "That any person who shall offer or expose for sale any of the articles named in schedule C, * * * * shall be *deemed* the manufacturer thereof, and subject to all the duties, liabilities, and penalties imposed by law in regard to the sale of domestic articles without the use of the proper stamp or stamps denoting the tax paid thereon." If, when the plaintiffs exposed these goods for sale on October 22, 1866, they were in contemplation of law the manufacturers of them, it was their duty to first affix "thereon the proper stamp," in default of which the goods were forfeited to the United States and liable to seizure. (13 Stat. 296, 482.)

By section 70 of the Act of 1866 (14 Stat. 173), it is provided that "whenever by the terms of this act a duty is imposed upon any articles, goods, wares or merchandise, manufactured or produced, *upon which no duty was imposed by either of said former acts*, it shall apply to such as were manufactured or produced, and not removed from the place of manufacture or production on the day when this act takes effect." The same section declares, "That this act shall take effect when not otherwise provided on August 1, 1866."

The goods in question fall within this category, as no duty was imposed upon such goods "by either of said former acts."

These are the only provisions of the internal revenue acts that bear upon the question.

Taking this legislation together what was the intention of Congress as to taxing these goods? That intention when ascertained it is the duty of the Court to give effect to, without regard to any other consideration.

For the plaintiff it is contended that Congress did not intend to impose a duty upon canned goods made or pre-

pared before October 1, 1866. So far as the language of schedule C is concerned, it supports the argument.

But it is evident from the provision just quoted from section 70, that such was not the intention of Congress in regard to all such goods as had not been "removed from the place of manufacture or production" before August 1, 1866; for this section expressly provides that the duties specified in schedule C should be imposed upon such goods. And if the intent of this provision was uncertain or open to argument, every consideration of just public policy in the imposition of taxes would conduce to this conclusion.

To tax canned goods after October 1, and exclude from the operation of the law, all such as were manufactured before that date, would, to that extent, be an unjust discrimination in favor of the owners of the latter class of goods. Congress having thus provided for the taxation of canned goods "not removed from the place of manufacture or production" before August 1, 1866, from this fact, the inference is reasonable that it also intended to tax those which, although removed, had not yet passed into the hands of the consumer. No reason is given, why canned goods in the hands of the manufacturer when the act of 1866 took effect, should be liable to pay a duty, while the same class of goods in the hands of the jobber or retailer, should be exempt. At the same time it is admitted, that if Congress has not provided for taxing such goods in the hands of the merchant, as well as the manufacturer, whatever may appear to have been the general purpose of its enactment, the Court cannot supply the omission. But if the intention of the legislature in this particular be doubtful, or ambiguously expressed, it is the duty of the Court to construe the act, if possible, so as to make it harmonize in such particular, with the general purpose, plainly expressed.

Taking the whole legislation together, I do not think that Congress intended to exempt the goods of the plaintiffs from taxation, because they were "made and prepared" before October 1—if exposed for sale after that time. If the question turned upon the language of the provision in

Cardinel v. Smith.

schedule C only, the conclusion might be otherwise. But the law of the case is not found in this provision alone. In fact, these schedules are mere brief indexes of subjects, the general legislation concerning which, is found elsewhere in the body of the acts.

The clause of section 9 (14 Stat. 144) above quoted, in my judgment, settles the law of this case against the plaintiffs. Their counsel, apparently conscious that the letter of this section was against them, sought to modify its effect, by endeavoring to show that when it declares that "a person who shall offer or expose for sale, any of the articles named in schedule C, * * * shall be *deemed* the manufacturer thereof," it only creates a disputable presumption that such person is "the manufacturer thereof," which, in this case, is overcome by the admitted fact, that the plaintiffs are not the manufacturers, but only the vendors of the articles.

The word "*deemed*" in this connection means *judged, determined*; and when it is enacted that the vendor of an article shall for any purpose, "be *deemed* the manufacturer thereof," for such purpose, he is to be absolutely considered such manufacturer. Indeed, it would be of little use for Congress to declare that a vendor of canned goods, for the purpose of internal revenue, should be *deemed* a manufacturer thereof, if such declaration could be overcome and held for naught, by showing that, in fact, he was not such manufacturer. Now, by such declaration, Congress does not undertake to destroy the distinction, in fact, between the two persons or occupations, but only that the law applicable to the manufacturer of canned goods, shall also be applicable to the vendor thereof—that in this respect, and for this purpose, they shall be treated alike.

The internal revenue act is a piece of patch work, and it is sometimes difficult to reconcile its various provisions with each other. Its great length, and the multiplicity of subjects which it embraces, enhances the labor of understanding it. I confess I do not feel the utmost confidence in the present construction and application of it, though I

Cardinel v. Smith.

feel well satisfied that it is just and equal in its consequences.

As has already been observed; if a tax like this is only imposed upon articles manufactured after it takes effect, it operates as an unjust discrimination against the future manufacturer. And I am free to admit that this consideration has had its influence upon my mind in reaching the conclusion that Congress did not intend to tax canned goods in the hands of the manufacturer when the act took effect, and exempt the goods in the hands of the seller, because manufactured before that date.

It appears that the Commissioner of Internal Revenue has decided this question both ways. By a circular from the "Office of Internal Revenue," dated October 3, 1866, it was declared, that "all canned goods, either in the hands of the manufacturer or purchaser, sold or offered for sale on and after the first instant, are required to be stamped as specified in schedule C of the act of July 13, 1866." By a second circular on the subject, from the same office, dated October 27, 1866, it was declared: "While it is believed that it was the purpose and intent of Congress to impose a stamp tax upon the above named articles (canned goods) if sold, or offered for sale, or removed for consumption in the United States, on or after October 1, 1866, regardless of the time of their manufacture or production, that intent is so imperfectly expressed as to render it doubtful whether under a proper construction of the language of the statute such a tax can be collected."

It is probable that by the time the second circular reached the revenue offices, nine tenths of the goods in question, such as had passed out of the hands of the manufacturer or producer before October 1, 1866, had paid the duty. It is also to be observed, that the decision of the commissioner appears to have been based upon the language of schedule C alone, without reference to the other sections of the act above cited.

Again, the commissioner, as a matter of public policy, might instruct his subordinates to refrain from enforcing

The United States v. John M. Avery.

this provision of the act according to this construction, for the reason that it was involved in some doubt, and might lead to unprofitable litigation. In some such light, I read the decision in the second circular. A department ruling made under such circumstances and from such motives, well enough in itself, can have but little weight in a Court called upon to determine what the law actually was, as appeared by the acts of the legislature, at the time of this seizure.

There must be judgment for the defendants in bar of the action, and for their costs and disbursements.

W. W. Pendegast, for plaintiffs.

R. F. Morrison, for defendants.

CIRCUIT COURT, APRIL 10, 1867.

THE UNITED STATES, *ex relatione* JOHN BIGLER,
v. JOHN M. AVERY.

The act of July 1, 1862 (12 Stat. 433) creating the office of Assessor of Internal Revenue, does not prescribe the tenure thereof, and therefore the incumbent is deemed to hold such only during the pleasure of the appointing power.

Where Congress has the power to create an office, it may prescribe the term for which it shall be holden by the incumbent, and in such case there is no power of removal during such term.

The Constitution does not expressly authorize or provide for removals from office otherwise than as a consequence of impeachment, and as an implied power "necessary and proper for carrying into execution" any power expressly vested in the government or any department or officer thereof, and therefore the power of removal can only be claimed by or attributed to the appointing power.

In this case the appointing power is the President and Senate, acting concurrently, and in the absence of legislation and precedent to the contrary, it follows that the President alone has not the power of removal.

By the action of the first Congress and the uniform practice on the subject, down to the time when this controversy arose, the power of removal by the President had been practically conceded by Congress, and the question being one which properly belongs to that body to regulate, its past action

The United States v. John M. Avery.

and acquiescence must be regarded by the Courts as establishing or evidencing a regulation on the subject.

The power to regulate the subject of removals from office belongs to Congress, and that body having for three fourths of a century practically conceded the authority to the President to make removals without the advice and consent of the Senate, the Court does not feel at liberty at this late day to deny him this power.

The defendant having surrendered the office in controversy, to a person duly authorized to receive it since the filing of the answer, is entitled to file a supplemental answer setting up this fact as a plea *puis darrien continuance*; and such surrender terminates the controversy except as to costs, for which the plaintiff is entitled to judgment.

This was an information in the nature of a *quo warranto*, brought on the relation of John Bigler, to oust the defendant from the office of assessor of internal revenue for the fourth district of California.

It was tried by the Court without the intervention of a jury, and the facts are stated in the findings are follows:

I. That in the month of February, 1863, the defendant was duly appointed assessor of internal revenue for the fourth district of California, and thereupon, being first duly qualified therefor, did enter upon such office, and perform the duties and receive the emoluments thereof, continuously, until October 20, 1866.

II. That on September 19, 1866, in the recess of the Senate, John Bigler was duly commissioned by the President assessor of internal revenue for the district aforesaid, "for the time being, and until the end of next session of the Senate of the United States, and no longer."

III. That on October 20, 1866, said Bigler, having first taken the oath of office prescribed by law, did demand of the said defendant the surrender of the books and papers pertaining and belonging to the office aforesaid, then in the possession and control of said defendant, who then refused to surrender or deliver the same to said Bigler; and at the date of filing the information herein, still so refused.

IV. That from and after October 20, 1866, and at and after the filing of the information herein, the defendant claimed to be the legal incumbent of the office aforesaid, by virtue of his appointment and qualification aforesaid,

The United States v. John M. Avery.

and that during the periods last aforesaid, did act as assessor of internal revenue of the district aforesaid, and deny that said Bigler, by virtue of the commission granted to him as aforesaid, or otherwise, had or acquired any right to enter upon such office, or exercise the powers or perform the duties thereof.

V. That during the session of the Senate next following the issuing of the commission to Bigler as aforesaid, the President nominated said Bigler for the office aforesaid, but the Senate refused to consent to such nomination, and rejected the same; and that afterwards, during the session of the Senate last aforesaid, the President nominated T. J. Blakeny for the office aforesaid, to which nomination the Senate then consented, and thereupon said Blakeny was duly commissioned as assessor for the district aforesaid.

VI. That on March 9, 1867, W. C. Felch was duly appointed assistant assessor for a portion of the district aforesaid; and that at the date of such appointment, said Blakeny was absent from the State of California, and had not then entered upon the office aforesaid, and therefore said Felch was authorized by law to act as assessor of the district for the time being.

VII. That on March 14, 1867, and while said Felch was acting as assessor as aforesaid, he demanded of the defendant the possession of said office and the books and papers pertaining thereunto; and the defendant then surrendered and delivered the same to said Felch, as required.

DEADY, J. The Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers, and Consuls, Judge of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of law, or in the heads of departments."

Section 2, of the Internal Revenue Act of July 1, 1862 (12 Stat. 433), creates the office in controversy, and provides for the appointment of the incumbent. The material words of the section are these: "That the President of the United States be, and he is hereby authorized * * * to nominate, and by and with the advice and consent of the Senate to appoint an Assessor * * * for each such district, who shall be resident within the same." Upon these provisions of the constitution and statute, and the facts found in this case, arises the question, did the commission to Bigler, in conjunction with his subsequent qualification and demand upon the defendant, operate, in contemplation of law, to remove the defendant from the office of assessor of the fourth district?

By the terms of the act under which the defendant was appointed, there is no limitation upon the tenure of the office, and the constitution is silent upon the subject, except as to judicial offices. The defendant not having any fixed term in the office, must be considered as holding it at the pleasure of the appointing power. I admit that, to my mind, this conclusion is not a necessary one; for, from the premises, it appears equally logical to conclude that the defendant is entitled to hold the office during good behaviour. But this question is not now open to argument in this Court. In *ex parte Herman* (13 Peters, 258-9), it was expressly decided by the Supreme Court, that when the law does not fix the term of office, it is held at the pleasure of the appointing power. In that case a clerk of a District Court had been removed by the judge of the Court, and there could be no question but that the removal was made by the appointing power. In this case the appointing power is the President and Senate, acting concurrently, and the alleged removal is the act of the President alone. Had the President this power as the law was at the time of the commission to Bigler? No case in which the question has been directly decided has been cited in the argument, and I am not aware that any exists. The case of *Herman, supra*, states the historic fact, that at an early day in the existence of the national

The United States v. John M. Avery.

government, it was "much disputed," whether the power of removal was in the President and Senate, or in the President alone, and that, by both practical and legislative construction, it was assumed and acted upon, that the power was in the President alone. But the Court did not actually decide that this construction of the constitution was warranted by its language, and the question was not really before them for adjudication; yet it cannot be denied that in some measure the Court gave its sanction to this doctrine. They speak of "its having become the settled and well understood construction of the constitution, that the power of removal was vested in the President alone in such cases, although the appointment of the officer was by the President and Senate."

In the case of the *United States v. Guthrie* (17 How. 284), the power of the President to remove an officer, appointed with the advice and consent of the Senate, was called in question but not decided. The act of Congress creating the office of Judge in the Territory of Minnesota had provided that the incumbent thereof should hold for four years. The President removed the relator before the expiration of his term, and mandamus was brought against the defendant—the Secretary of the Treasury—to compel him to pay the relator his salary. A majority of the Court, avoiding the decision of the main question—the power of removal—decided that the remedy was not well taken, and dismissed the application for the writ. Mr. Justice McLean delivered a dissenting opinion, in which he discusses the President's power of removal at great length. As to the particular case then before the Court, he maintained that the removal was not only unauthorized, but contrary to law. He says: "If Congress have the power to create the Territorial Courts, of which no one doubts, it has the power to fix the tenure of office. This being done, the President has no power to remove a Territorial Judge, more than he has to repeal a law."

This conclusion appears to me both just and legal. Congress having the power to create an office, may prescribe the

The United States v. John M. Avery.

term for which it shall be holden, or whether it shall be holden at pleasure. In the former case there is no power of removal anywhere, except as a consequence of impeachment. If the President alone, or the President and Senate in conjunction, were allowed to make removals in such cases, it would be equivalent to allowing him or them "to repeal a law."

But in that case there was a fixed term of office, while in the case of the defendant, Avery, no term is provided for, but the incumbent holds at the pleasure of the appointing power. Upon the real question in this case, Had the President the power to remove the defendant without the consent of the Senate? Justice McLean argues for the negative, but seems to think that the power had been "too long established and exercised to be now questioned." Referring to the controversy in Congress upon the subject, upon the passage of the act creating the Department of Foreign Affairs, in 1789, he says: "There was great contrariety of opinion in Congress on this power. With the experience we now have, in regard to its exercise, there is great doubt whether the most enlightened statesman would not come to a different conclusion. The Attorney General calls this a constitutional power. There is no such power given in the constitution. It is presumed to be in the President, from the power of appointment. This presumption, I think, is unwise and illogical. The reasoning is: the President and Senate appoint to office; therefore, the President may remove from office. Now, the argument would be legitimate, if the power to remove were inferred to be the same that appoints. * * * If the power to remove from office be inferred from the power to appoint, both the elements of the appointing power are necessarily included. The constitution has declared what shall be the executive power to appoint, and by consequence, the same power should be exercised in a removal. But this power of removal has been, *perhaps*, too long established and exercised to be now questioned. The voluntary action of the Senate and the President would be necessary to change the practice ;

and as this would require the relinquishment of a power by one of the parties, to be exercised in conjunction with the other, it can hardly be expected."

So far as adjudged cases are concerned, this is all that can be found bearing upon the subject. Among the elementary writers the question is discussed by Kent and Story. The former (1 Kent's Com. 309-10), after stating the opinion of the Federalist, pending the ratification of the constitution, that "the consent of the Senate would be necessary to displace as well as to appoint," and referring to the different construction given to the constitution by the first Congress, says: "This amounted to a legislative construction of the constitution, and it has ever since been acquiesced in and acted upon as of decisive authority in the case. * * * This question has never been made the subject of judicial discussion, and the construction given to the constitution in 1789, has continued to rest on this loose, incidental declaratory opinion of Congress, and the sense and practice of the government since that time. It is, however, a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the President alone, the tenure of every executive office appointed by the President and Senate, should depend upon inference merely, and should have been gratuitously declared by the first Congress, in opposition to the high authority of the Federalist; and should have been supported or acquiesced in by some of those distinguished men who questioned or denied the power of Congress, even to incorporate a national bank."

Story (2 Com. § 1,538) says: "The power to nominate does not naturally or necessarily include the power to remove; and if the power to appoint does include it, then the latter belongs conjointly to the Executive and the Senate. In short, under such circumstances, the removal takes place in virtue of the new appointment, by mere operation of law. It results, and is not separable, from the appointment itself." After stating the arguments on both sides of the question, and referring to the legislative construction in

The United States v. John M. Avery.

favor of the executive power, by the Congress in 1789, the distinguished commentator concludes (§ 1,543): "That the final decision of this question so made was greatly influenced by the exalted character of the President then in office, was asserted at the time, and has always been believed. Yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the country. The public, however, acquiesced in this decision, and it constitutes, perhaps, the most extraordinary case in the history of a government, of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions." And again (§ 1,544), "whether the prediction of the original advocates of the executive power, or those of the opposers of it, are likely, in the future progress of the government, to be realized, must be left to the sober judgment of the community, and to the impartial award of time. If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to inferior offices (which appellation probably includes ninety-nine out of a hundred of the lucrative offices of the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases."

The constitution does not expressly provide for removal from office, otherwise than as the legal effect or consequence of "impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." (Art. 11, § 4.) If the power of direct removal from office is to be attributed to any department of the government, as a necessary to some express power, my mind inclines to the conclusion, that upon the language of the constitution, such power can only be attributed to the appointing power. The appointing

The United States v. John M. Avery.

power, in this case, is the President and Senate, acting concurrently. In the absence of legislation and precedent, I think it should be held that the President alone had no power to remove the defendant, and that, consequently, the commission of Bigler was a void act—there being then no vacancy in the office in question, and the President having no power to create such a vacancy. But, by the action of the first Congress, and the uniform practice of the government down to the time when this controversy arose, the President's power of removal had been practically admitted and acted upon. The subject is one which, in my judgment, properly belongs to Congress to regulate, rather than the courts. It is a legislative or political question, and not a judicial one. Heretofore, the Supreme Court has regarded the action of Congress in the premises and subsequent practice, as establishing or evidencing a regulation of the subject, which it was not at liberty to ignore or disregard. Such considerations, at this late day, should have even more force in this Court of inferior jurisdiction. It is true that many of the wisest and best men of the republic have always regarded the construction given to the constitution, by the Congress of 1789, as unwise and impolitic, and I think subsequent events have vindicated the correctness of their opinion. But in this government the people must learn by experience, and within the constitutional limits of legislative action and judgment, they must be free, through their representation in Congress assembled, to conduct the administration of their government uncontrolled by the courts. In the progress of time, it has been found or deemed that the unqualified power of removal from office by the President works injuriously, and Congress has interfered to control and regulate the exercise of that power, by the passage of what is known as "The Tenure of Office Bill." In the passage of this act by Congress it must have been assumed, and as I think correctly, that the constitution left the subject of direct removals from office to be regulated by the legislative power. In the great debate, which occurred in the Senate on this subject in 1835, Mr. Clay, Mr. Webster

and Mr. Calhoun, all agreed in maintaining that the constitution did not give the President the power of removal, and that the power was properly subject to legislative control and regulation.

From Mr. Calhoun's speech on this occasion, I quote, as follows: "If the power to dismiss is possessed by the Executive, he must hold it in one or two modes; either by an express grant of the power in the Constitution, or as a power necessary and proper to execute some power expressly granted by that instrument. All the powers under the Constitution may be classed under one or the other of these heads; there is no intermediate class. The first question then, is, has the President the power in question by any express grant in the Constitution? He who affirms he has, is bound to show it. That instrument is in the hands of every member; the portion containing the delegation of power to the President, is short; it is comprised in a few sentences. I ask Senators to open the Constitution, to examine it, and to find, if they can, any authority of the President to dismiss any public officer. None such can be found; the Constitution has been carefully examined, and no one pretends to have found such a grant. Well, then, as there is none such, if it exists at all, it must be as a power necessary and proper to execute some granted power; but if it exists in that character, it belongs to Congress, and not the Executive. I venture not the assertion hastily; I speak on the authority of the Constitution itself—an express and unequivocal authority which cannot be denied nor contradicted. Hear what that sacred instrument says: 'Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers (those granted to Congress itself), and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' Mark the fullness of the expression, Congress shall have power to make all laws, not only to carry into effect the powers exclusively delegated to itself, but those delegated to the Government or any department or officer thereof; comprehend-

The United States v. John M. Avery.

ing, of course, the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows that, to whatever express grant of power to the Executive the power of dismissal may be supposed to attach; whether to that of seeing the laws faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive power in the President, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it by the provisions of the Constitution, cited, from the Executive to Congress, and places it under its control to be regulated in the manner which it may judge best.

“Such are the arguments by which I have been forced to conclude that the power of dismissing is not lodged in the President, but is subject to be controlled and regulated by Congress. I say forced, because I have been compelled to the conclusion in spite of my previous impressions; relying upon the early decision of the question, and the long acquiescence in that decision.”

To the force of this argument, I think nothing can be added. It amounts to demonstration. The power is with Congress to regulate removals from office. Congress, by early action and long acquiescence, has allowed, if not authorized, the President to make removals without the consent of the Senate in each particular case. The question being one of the exercise of a political power, which is within the power of Congress to control and regulate, I do not deem it meet or proper for this Court, at this late day, to assert by its judgment that all the Presidents, from Washington to the present, have, in making removals from office, acted without authority or right in the premises.

As the law and long established usage stood at the time of the commission to Bigler, the power of removal must be conceded to the Executive by the Courts. Congress had practically so conceded it, for three fourths of a century. In the determination of political questions, the Courts are subordinate to the political department of the Government.

The United States v. John M. Avery.

In *ex parte* Herman, *supra*, the Supreme Court, without deciding the question, expressed a strong opinion that so well established a practice upon such a subject, could not be disregarded by the Court, even at that early day.

A supplemental answer has been filed in this case, stating the facts as found by the Court since the demand upon the defendant by Bigler. This answer was filed, subject to the defendant's right to plead these facts at the time. I think the answer may be filed, and that the matter set forth is material. It is a plea *puis darrein continuance*—good at common law and under the code. From it, it appears that the defendant had relinquished the office to the United States and delivered the books and papers to an officer duly authorized to receive them. At any time before trial the defendant may yield the controversy and surrender the office. This terminates the controversy, except as to costs, and for these judgment must be given in favor of the United States.

One other question made by the learned counsel for the defendant remains to be noticed. The Tenure of Office Bill, which is understood to have become a law on March 3, provides, as appears from a newspaper report read in Court by counsel, that a person holding office by the consent of the Senate shall only be removed by the concurrence of that body. Assuming this to be the correct reading of the Tenure of Office Act, I cannot bring my mind to agree with counsel for the defendant—that the defendant, at the passage of this Act, *held* the office, in contemplation of law. True, he was in the office, as the information alleges, but without legal right. At that time, so far as he can be said to have held the office, it was not by virtue of his appointment by and with the advice and consent of the Senate, but rather as an intruder, and without legal right.

Judgment for the plaintiff for its costs and disbursements.

Delos Lake and *Joseph Hoge*, for plaintiff.

George Cadwallader and *John McCullough*, for defendant.

Martinetti v. Maguire.

CIRCUIT COURT, APRIL 20, 1867.

JULIAN MARTINETTI *et al.* v. THOMAS MAGUIRE *et al.*THOMAS MAGUIRE *et al.* v. JULIAN MARTINETTI *et al.*

Where a party seeks to enjoin another from the exhibition or performance of a spectacle or dramatic composition, he must show an exclusive right in himself to the use of such spectacle or composition, before his application will be allowed.

Where two spectacles, called respectively the Black Crook and the Black Rook produced the impression upon those who witnessed them that they were substantially the same: *Held*, that one was a colorable imitation of the other.

The act of August 18, 1856 (11 Stat. 138), which gives "the proprietor of a *dramatic composition*, designed or suited for public representation, the sole right to represent the same, does not include a mere exhibition, spectacle or arrangement of scenic effects having no literary character—the same not being a "dramatic composition" within the meaning of the act.

The act aforesaid purports only to apply to dramatic compositions "suited to public representation," and therefore it ought not to be construed to protect the proprietor of a composition of an immoral or indecent character, in the exclusive right to represent the same.

In the exercise of its power to secure "to authors and inventors the exclusive right to their respective writings and discoveries" (Con. Art. I, § 8, sub. 8), Congress may discriminate in favor of good morals, and against vice.

The power aforesaid is conferred on Congress, not generally, but only as a means to this particular end—"To promote the progress of science and useful arts"—therefore, it seems that it does not extend to writings of a grossly immoral or indecent character, or to inventions expressly designed to facilitate the commission of crime.

The complainants in *Martinetti et al. v. Maguire et al.* brought suit to enjoin the defendants therein from performing or exhibiting a play or spectacle, called by them the "Black Crook," alleging that the same was a mere colorable imitation of a play known as the "Black Rook," which is the property of the complainants. Thereupon, Maguire *et al.* brought suit against Martinetti *et al.* to enjoin the latter from performing a play called by defendants the "Black Rook," alleging that the same was a mere colorable imitation of a play known as the "Black Crook," which is the property of said complainants.

Martinetti v. Maguire.

Upon the filing of the bills, the complainants in each suit gave notice of an application to the Court for a provisional injunction, as prayed for in the bill, until the final hearing. By consent of parties, the motions were heard together, upon the bills and evidence taken at the hearing.

DEADY, J. The bill of the complainants, *Martinetti et al.*, charges, that on October 17, 1866, at New York city, one James Schonberg composed and copyrighted a dramatic composition called the Black Rook, and then and there assigned the same exclusively to complainants; that complainants are the proprietors of the Metropolitan Theatre, in San Francisco, and are about to produce on the stage thereof said play of the Black Rook; that the defendants, *Maguire et al.*, by improper means procured a manuscript copy of the Black Rook from an employee of complainants, and is exhibiting the same at the theatre of said defendants', *Maguire's Opera House*, in San Francisco, to the injury of complainants; and that defendants before making such exhibition, changed the name of said play to the Black Crook, and also changed the names of the characters, and made some slight alterations in the dialogues and incidents thereof.

The bill of the complainants, *Maguire et al.*, charges, that about July 1, 1866, one Charles M. Barras, of New York city, composed a dramatic composition called the Black Crook, and copyrighted the same; that said play was exhibited at Niblo's Theatre in New York, early in September, 1866, and continuously since that date, for the benefit of and with great gain to the author; that about March 25, 1867, the complainants became the exclusive assignee of the right to exhibit the Black Crook in the State of California, and in pursuance of such assignment, and by virtue of such right, are now exhibiting the same at *Maguire's Opera House* aforesaid; that during the exhibition of the Black Crook at Niblo's, as aforesaid, the defendants procured a copy of the same by employing one Schonberg, or other person, to attend such exhibition and take down the

Martinetti v. Maguire.

parts in short-hand, as they were spoken and acted by the players; and that the defendants are now about to exhibit such play from the copy so obtained, at the Metropolitan Theatre aforesaid, under the name of the Black Rook, to the damage of the complainants.

A number of witnesses have been examined on either side as to the identity of the plays. So far as I can judge from the evidence, the plays are identical. One of them must be a mere colorable imitation of the other. The striking similarity in the names—Black Crook and Black Rook—is enough of itself to suggest that the one is an imitation of the other. All the disinterested witnesses who have been present at the exhibition of the Black Crook at Niblo's and Maguire's, agree in stating that they thought the plays the same. It is admitted and charged by Martinetti, that the play now on exhibition at the Opera House is substantially the play which he calls the Black Rook, and claims to be the proprietor of. For the purpose of the comparison, let it be assumed that the Black Rook is being played at Maguire's Opera House, and the Black Crook at Niblo's. Whatever may be the technical differences in the exhibitions at these two places, if the result is so nearly the same as to produce the impression that they are identical upon ordinary spectators, it seems to me that, that as a question of fact, one ought to be held a mere colorable imitation of the other. A play like this has no value except as it is appreciated by the theatre-going public. It cannot be *read*—it is a mere spectacle, and must be *seen* to be appreciated. If the similarity in general character and effect between the alleged imitation and original, is sufficient to deceive the public who ordinarily witness such exhibitions, it is fair to conclude that the one is a piracy of the other.

Which, then, is the original, and which is the imitation? The respective dates of their composition seem to furnish a satisfactory answer to this question. It is admitted that the Black Crook was composed and copyrighted in the early part of July, 1866, while it is not claimed that the Black

Martinetti v. Maguire.

Rook was composed earlier than the middle of the October following—and after the former had been exhibited at Niblo's for at least six weeks. Unless both are original compositions or contrivances—unless this striking similarity between them is a mere coincidence, I must conclude that the Black Crook is the original, and the Black Rook the imitation or copy. As neither of these spectacles have any substantial claim to originality, I suppose the coincidence is possible. But such coincidence is not probable, while all the other circumstances of the case point to but one conclusion—that the manuscript of the so-called Black Rook, procured in New York by Martinetti from Schonberg, was a mere colorable imitation or copy of the Black Crook, obtained by improper means or without authority of the proprietors.

Whether Martinetti knew this fact at the time or since, is immaterial. In any view of the matter, he has only the same right in the premises that Schonberg would have, if he were now the party before the Court. Under the circumstances disclosed by the evidence, the reasonable inference is, that Martinetti did not purchase the Black Rook, believing it to be an original composition of that name, but rather that he employed Schonberg, or some other, to procure a copy of the Black Crook, to which, after making some unessential changes upon it, he gave the name of Black Rook. No evidence is produced of the alleged purchase of the Black Rook, except the allegation to that effect in the bill. If Martinetti had purchased an original composition, or what he believed to be such a composition, called the Black Rook, which had been copyrighted by the author, it is reasonable to infer that he would have taken an assignment of the latter's right to himself, and have produced it here in evidence or accounted for its absence. The omission to do this tends strongly to disprove the allegation of a purchase from Schonberg by Martinetti.

On the other hand, it is admitted that Maguire has the legal right to exhibit the Black Crook in California, and also that the present exhibition at the Opera House, is being

Martinetti v. Maguire.

made, not from the copy obtained from the author at the time of the assignment by him to Maguire, but from a copy of the manuscript which Martinetti alleges that he obtained from Schonberg; and that Maguire's copy is now on the way here from New York.

Martinetti's copy being prior in point of time to the assignment to Maguire, if it had been obtained by legitimate means, he would have the legal right to make an exhibition or representation of the play from such copy as against the author or his subsequent assigns. In that case, such copy would be the literary property of Martinetti, and the obtaining of a copy of this manuscript by improper means—without the consent of Martinetti—would be a fraud upon him. The purchase of this copy by Maguire's manager from Martinetti's employee—McCabe—was made under such circumstances, that he did not acquire any right thereby as against the lawful proprietor of the original. At the time of the sale McCabe declined to tell when, where, or how he got the copy. Maguire's manager then knew that the Martinettis were rehearsing the spectacle set down therein. The manager from these and other circumstances had good reason to believe that he was purchasing stolen property; and whether he believed so or not, as such was the fact, the effect is the same.

But Martinetti had no literary property in the copy which he obtained from New York. By literary property, of course, I mean property in the composition, and not in the mere paper. The Black Rook, or manuscript in the possession of Martinetti, was itself a plagiarism of, or a slightly disguised copy of, the Black Crook. This being so, it was stolen property in the same sense that the copy was which McCabe sold to Maguire, and therefore Martinetti has no literary property in it. He is neither the author, assignee or donee of the play or the manuscript of it. For this reason, I am clear that he cannot enjoin Maguire from the use of his copy, however obtained. In this respect, both parties are wrong-doers and *in pari delicto*.

Martinetti v. Maguire.

More than this, I suppose that the owner of a play who finds that a colorable imitation of it, or a true copy surreptitiously obtained, is in the hands of a third person, may purchase the same, even if he should know at the time that the person from whom he is purchasing has obtained it from another improperly. This may be the easiest and cheapest way of protecting his rights as owner. In effect he is only buying his own property—or buying his peace instead of going to law.

This, I believe, disposes of all the grounds on which the complainants—Martinetti *et al.*—rely for an injunction, and their motion must, therefore, be denied, with costs.

On the other hand, if this play is a “dramatic composition,” within the purpose and meaning of the act of Congress (4 Stat. 436; 11 Stat. 138), the motion of the complainants—Maguire *et al.*—for an injunction against Martinetti *et al.* should be allowed. But as at present advised, I do not think it such a composition. All the witnesses agree—particularly the experts—that the so-called play of the Black Crook has no originality, and that it consists almost wholly of scenic effects, or representations taken substantially from well known dramas and operas. The evidence of W. B. Hamilton, the stage-manager of the Metropolitan, is explicit and satisfactory on that point. He has been an actor since 1828, in both Europe and America. He appears to be well informed in what pertains to his profession, and impressed me with his fairness and candor.

The Black Crook is a mere spectacle—in the language of the craft a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called Paradise, and as witness Hamilton expresses it, consists mainly “of women lying about loose”—a sort of Mohammedan paradise, I suppose, with imitation grottos and unmaidenly houris.

Martinetti v. Maguire.

To call such a spectacle a "dramatic composition" is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of *model artistes* might as justly be called a dramatic composition. Like those, this is a spectacle, and although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women "lying about loose" or otherwise, is not a dramatic composition, and, therefore, not entitled to the protection of the copyright act. On this ground, the application of Maguire *et al.* for an injunction is denied, with costs.

But, further, the act of Congress provides that a "dramatic composition" to be entitled to be copyrighted, must be "suited for public representation." What is intended by the word "suited?" Simply that the composition is technically adapted to the stage, and capable of being produced upon it? While it means this, I am inclined to think it means something more; that to be suited to public representation, it must be *fit* to be represented. I do not for a moment suppose or pretend that Congress has the power to interfere directly and prescribe a standard of good morals on this subject. But the benefit of copyright is a privilege conferred by Congress in pursuance of the constitution of the United States. In conferring this privilege or monopoly upon authors and inventors, I suppose that it is both proper and constitutional for Congress so to legislate, as to encourage virtue and discourage immorality.

Congress has power "to establish an uniform rule of naturalization." (Con. Art. 1, §8, sub. 4). In exercising this power, it has always discriminated in favor of morality, by providing that on the hearing of the application for citizenship, the applicant must prove that for five years prior to such application, "he has behaved as a man of good moral character." (2 Stat. 154).

Besides, the power to pass what are called copyright and patent laws, or as the constitution expresses it, to secure "for limited times to authors and inventors the exclusive right to their respective writings and discoveries," is given

Martinetti v. Maguire.

not generally, but only as a means to this particular end—"To promote the progress of science and useful arts." (Con. Art. I, §8, sub. 8). Hence, it expressly appears that Congress is not empowered by the constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of "science and useful arts." For this reason, an invention *expressly* designed to facilitate the commission of crime, as murder, burglary, forgery or counterfeiting, however novel or ingenious, could not be patented. So with a dramatic composition which is grossly indecent, and calculated to corrupt the morals of the people. The exhibition of such a drama neither "promotes the progress of science or useful arts," but the contrary. The constitution does not authorize the protection of such productions, and it is not to be presumed that Congress intended to go beyond its power in this respect to secure their "authors and inventors the exclusive right" to the use of them.

Upon this ground, I very much doubt whether the spectacle of the Black Crook is entitled to the benefit of copyright, even if it were admitted that it was a "dramatic composition."

In considering these questions, this Court does not pretend to be the conservator of the public morals in this respect. That is a matter for the local legislature. But in giving construction to the constitution and laws, when legitimately called upon to do so, it is the duty of all Courts to uphold public virtue, and discourage and repel whatever tends to impair it. Now, it cannot be denied that this spectacle of the Black Crook only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person. True, the lawfulness of such an exhibition depends upon the law of the place where it takes place. But when the author, inventor or proprietor thereof asks the power of this Court to protect him in the *exclusive right* to make such an exhibition under the copyright act, the matter assumes a very different aspect.

William H. Hinckley v. John M. Byrne, and others.

I am strongly impressed with the conviction that an injunction should not be allowed in this case on the ground that the Black Crook is not "*suited* for public representation"—not *fit* to be exhibited—within the meaning of the act of Congress; and on the further ground that it is not within the scope of the power granted to Congress to protect the authors or inventors of such exhibitions in "the exclusive right" to the use of them, as they neither promote the progress of *science* or *useful* arts.

Hall McAllister, for Martinetti *et al.*

Alexander Campbell, for Maguire *et al.*

CIRCUIT COURT, APRIL 22, 1867.

WILLIAM H. HINCKLEY v. JOHN M. BYRNE, SAMUEL CRIM, EDWARD F. BEALE, M. MYERSTEIN, DEUTSCHE BUCCHENDUNG, F. W. BARKHAUS, D. BARKHAUS, WILLIAM KRONING, J. BREWSTER, S. HAAS, JOSEPH KOHLER, F. X. HUBER, JOHN ANTHES, HIP HING, WAU HUP, SOO CHUNG, SAN JEE, SAM KEE, ABEL GUY, JOHN DOE, RICHARD ROE, JOHN DOE, JR., RICHARD DOE, JR., JOHN DOE 3 AND RICHARD ROE 3.

In an action *ex delicto*, a plea in abatement by one defendant, to the effect that the Court has not jurisdiction of his co-defendant, is bad on demurrer. Such objection is personal, and cannot be made by one defendant for another.

An action of ejectment against several defendants is in effect a separate action against each of them, and an objection to the jurisdiction of the Court on account of the *status* of a particular defendant, can only be taken by such defendant for himself.

An allegation in a plea in abatement that all the defendants in an action are not citizens of California, is bad on demurrer for uncertainty; the plea should state which of such defendants are not such citizens.

Where both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case, on account of the character of the parties thereto.

William H. Hinckley v. John M. Byrne, and others.

Where the action is between a citizen of a State and the subject of a foreign State, the Court has jurisdiction, on account of the character of the parties, without reference to the fact of which of them is plaintiff or defendant.

This was an action to recover possession of a 50-vara lot in San Francisco, on the southwest corner of Sacramento and Kearny streets, alleged to be worth \$300,000. Upon the part of some of the defendants there was a plea in abatement to the jurisdiction of the Court on account of the *status* of some others of the defendants, to which the plaintiff demurred.

DEADY, J. The complaint in this action alleges "that the plaintiff is a citizen and actual resident and inhabitant of the State of Massachusetts, United States of America," and "that each and all of the defendants * * * are citizens and residents of the State of California."

There are a large number of defendants. A portion of them plead in abatement to the jurisdiction of the Court. One of them pleads separately, submitting to the jurisdiction, but denying the ouster and possession. A number of the defendants do not plead at all. To the plea in abatement, the plaintiff demurs that the matters therein pleaded are not sufficient to abate the action.

The plea avers that at the time of the commencement of the action, nor since, *all* the defendants were not citizens of the State of California or of the United States, but that Soo Chung, Hip Hing, and William Kroning, are each and all aliens and citizens and subjects of the Empire of China, except said Kroning, *who is an alien*.

The first averment in this plea assumes that because *all* the defendants are not citizens of the State of California, the Court has no jurisdiction over any of them, and further, that the defendants joining in this plea, who *are* citizens of California, with one exception, may make the objection that their co-defendants are aliens, although such alien defendants refuse to join in the plea but submit to the jurisdiction. For reasons which will appear hereafter, I do not deem it necessary to absolutely decide the questions suggested by this statement of the plea. But I think that the

William H. Hinckley v. John M. Byrne, and others.

objection to the jurisdiction of the Court, that any of the defendants has not the *status* as to citizenship or alienage to give the Court jurisdiction over him, can only be made by such defendant.

In an action *ex contractu* where the defendants are jointly liable, such an objection when taken by the proper defendant would abate action as to all, for it must be maintained as a whole or fail. But the objection is a personal privilege and cannot be made by one defendant for another.

This is an action *ex delicto*, without even a community between the defendants in the wrong complained of, except they happen to be within the exterior lines of the premises sought to be recovered. In effect, the action is a separate one against each of them. The defendants are entitled to separate defences for such parts of the property as they may choose to defend for and to have a separate verdict and judgment upon such defence. In such case, the objection to the jurisdiction of the Court on account of the status of the defendant, should not be allowed to affect the jurisdiction as to other defendants.

An allegation that all the defendants are not citizens of the State of California, even although all the defendants joined in such plea, would be bad for uncertainty, because it would not apprise the plaintiff which of such defendants were not such citizens, so that he could be prepared to support the controverted allegation with proof.

But independent of these considerations, this demurrer must be sustained. The plea is bad in every respect.

The constitution (Art. III, § 2) provides that "The judicial power shall extend to all * * * controversies between a State or the citizens thereof, and foreign States, citizens or subjects."

Section 2 of the Judiciary Act (1 Stat. 78) provides, that "The Circuit Courts shall have original cognizance, concurrent with the Courts of the several States of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or

William H. Hinckley v. John M. Byrne, and others.

petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State."

It has long since been settled that an action between aliens *only* cannot be maintained in the Circuit Court. That the language of the Judiciary Act, giving jurisdiction where "an alien is a party," must be restrained within the terms of the constitution, which only "extends the judicial power" to an action between an alien and a citizen of a State of the United States. When both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case. (*Montalet v. Murray*, 4 Cranch, 46; *Mossman v. Higginson*, 4 Dal. 12; *Piquignot v. The Penn. Railway Co.*, 16 How. 104).

But the second part of this plea in abatement assumes, that if the *party defendant* is an alien or subject to a foreign State, the Court has no jurisdiction. This assumption is not warranted by the constitution or Judiciary Act, but is in direct contradiction of both. If the action is *between* a citizen of a State and the subject of a foreign State, the Court has jurisdiction. It is immaterial which party is plaintiff or which defendant. In *Jackson v. Twentymen* (2 Pet. 136) the Court says: "That by the constitution the judicial power was not extended to private suits in which an alien is a party, *unless a citizen be the adverse party.*" The case at bar comes within the latter alternative. Admitting the facts as affirmatively stated in the plea, the Court has jurisdiction, because the plaintiff is a citizen of the State of Massachusetts, and the defendants, Soo Chung, Hip Hing and Corning, are subjects of a foreign State. The action is *between* them and each is the *adversary* of the other. Then, whether these defendants are all citizens of the State of California, as alleged in the complaint, or a part of them are subjects of a foreign State, as averred in the plea, it makes no difference. The jurisdiction of the Court is undoubted in either case.

I may add, that as a question of pleading, the plea is otherwise insufficient, as to Kroning. It alleges that he is an

The Mariposa Co. v. C. C. Bowman.

alien. To allege that a party is *alien* is not sufficient to give jurisdiction to the Court. (*Wilson v. City Bank*, 3 Sum. 422). By a party of reasoning such an averment is not sufficient in a plea of abatement for the purpose of *preventing* the jurisdiction of the Courts. The language of the constitution is, that the party is a citizen or subject of a foreign State. As a matter of practice I think the plea ought also to disclose the name of the particular foreign State of which the party claims to be a citizen or subject, so as to give the adverse party an opportunity to traverse it.

The demurrer is sustained, with leave to the defendants joining in the plea in abatement to answer to the merits within five days, and upon the payment of the costs of the plea and demurrer.

William T. Wallace and John B. Felton, for plaintiff.

G. F. and W. H. Sharp, for defendants.

CIRCUIT COURT, APRIL 24, 1867.

THE MARIPOSA CO. v. C. C. BOWMAN.

An illegal demand paid under *duress* of property may be recovered back; but real property is not in *duress* unless there be an illegal demand made against the owner, coupled with a present power or authority, in the person making such demand, to sell or dispose of the same, if payment is not made as demanded.

DEADY, J. The complaint states that on November 18, 1862, Cyrus A. Eastman obtained a decree in the proper Court of the State of California for foreclosure and order of sale of a portion of the real property known as the Mariposa estate; and that such portion of said property was then owned by John C. Fremont and others, but that for a year prior to the commencement of this action—September 24, 1866—such estate, including the mortgaged premises, was the property of the plaintiff—a foreign corporation, formed

The Mariposa Co. v. C. C. Bowman.

under the laws of the State of New York, for the purpose of mining on such estate.

That while such order of sale was in the hands of the sheriff, and before a sale of the premises was made thereunder, the decree of foreclosure was duly paid and satisfied, but the sheriff afterwards sold the property in question under such order, and wholly disregarded the fact that the amount due upon said decree had been fully paid.

That at such sale the defendant became the purchaser, and received from the sheriff a certificate of sale, dated March 22, 1866, and was about to receive a deed from him therefor, and that the proceedings were a cloud upon the title of the plaintiff and impaired the value of its stock.

That a deed from the sheriff in pursuance of such proceedings would have been a further cloud upon such title, and that the plaintiff for the purpose of dispelling this cloud and "preventing the injury done to it by the acts and proceedings aforesaid," on September 18, 1866, paid to defendant the sum which he pretended to have paid for the property at the sale—namely, \$38,003.60, together with 12 per centum thereon, and the fee for the certificate—\$2.

That there was collusion between said Eastman and the defendant in this—that defendant did not pay any money on account of the purchase, but by an arrangement with Eastman the amount bid was credited on the decree, and that the defendant then knew that the decree had been fully paid.

Although the fact is not explicitly stated in the complaint, it must be inferred from what appears therein, that the plaintiff, after the order of sale was issued, succeeded in some way to the interest of Fremont and others, and thereby became entitled to redeem the property from the purchaser, at the sale aforesaid.

On this state of facts the plaintiff claims that the payment by it to the defendant was made under such compulsion as entitles it to maintain this action to recover back the amount so paid.

The case of the plaintiff has been presented with great zeal and ability by counsel, but my judgment is not convinced.

The Mariposa Co. v. C. C. Bowman.

The leading case cited for the plaintiff—*Boston and Sandwich Glass Co. v. City of Boston* (4 Met. 187)—gives the rule on this subject as follows: “If a party with a full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards allege such payment to have been made by compulsion, and recover back the money, even though he should protest, at the time of such payment, that he was not legally bound to pay the same. The reason of the rule, and its propriety, are quite obvious, when applied to a case of payment upon a mere demand of money, unaccompanied with any power or authority to enforce such demand except by a suit at law. In such case, if a party would resist such demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party who pays the money the privilege of selecting his own time and convenience for litigation; delaying it, as the case may be, until the evidence, which the other party would have relied upon to sustain his claim, may be lost by the lapse of time and the various casualties to which human affairs are exposed.”

“The rule alluded to, when properly applied, is doubtless a salutary one, and is not to be departed from, but in cases resting in a plain and obvious distinction from such as are ordinarily and familiarly known as embraced within it.”

The Court then states the exception as follows: “If there be a controlling necessity in the case, arising from the peculiar circumstances *under which the money is demanded*, the rule does not apply.”

The cases cited in support of this exception to the general rule, are, where money is extorted by duress of goods as where a party having the plate of another in pawn, refuses to deliver it to the owner, except upon the payment of an illegal demand; or where tonnage or light money is illegally demanded by a collector as a condition precedent to granting a clearance to a vessel, or to liberate a raft of lumber

The Mariposa Co. v. C. C. Bowman.

detained to exact an illegal toll; "and generally, where money is paid to *obtain possession of property* which the party, making the illegal demand, *has under his control*, such payment will be considered compulsory." (*Astley v. Reynolds*, 2 Strat. 916; *Ripley v. Gelston*, 9 John. 201; *Chase v. Dwinal*, 7 Green. 134; *Shaw v. Woodcock*, 7 Barn. & Cres. 73; *Morgan v. Palmer*, 2 Barn. & Cres. 729.)

In the case at bar, the facts were all known to the plaintiff at the time of payment. The property alleged to be in duress, was in its possession and still remains so. No *demand* was made upon the plaintiff for money whatever. But on the contrary, the plaintiff as a volunteer came forward and paid this money to the defendant, for the purpose, at most, of removing what it deemed a cloud upon its title, or preventing a further cloud from settling thereon.

While I do not admit the doctrine contended for by defendant's counsel, that the duress of real property is never a sufficient compulsion to justify the payment of an illegal demand, I think it will be found, that a mere cloud upon the title, or of a threat to create one, has never been held to produce such compulsion. Suppose a case: a mechanic files a lien upon the property of A. The demand for which the lien is filed is an illegal one in whole or in part. So long as this claim remains of record unsatisfied, it may be said to be a cloud upon the title of the owner. But that is not a controlling necessity which compels the owner to pay the illegal demand, and if he does pay it with knowledge of the facts, he cannot recover back the amount.

To make it a case of payment under compulsion, there must be an illegal demand; coupled with a present power or authority in the person making such demand, to sell or dispose of the property, if payment is not made as demanded.

The case of a mortgage with a power of sale by the mortgagor without judicial proceedings, or of a mortgagor in possession after condition broken, or of a tax collector armed with a warrant which authorizes him to distrain property for taxes, are the leading instances given in the books of

duress of real property which excuses the payment of an illegal demand with knowledge of the fact.

Hays et al v. Hogan (5 Cal. 241), is cited by plaintiff to show that a party paying money to prevent a cloud upon his title to real property, may recover the amount, because paid under compulsion.

In that case the defendant was proceeding to sell the property of the plaintiff for municipal taxes, upon a warrant authorizing him to distrain for the same. The Court held that the tax was illegally assessed; and this was sufficient to justify the conclusion that the plaintiff was entitled to recover back the money. It is true that the Court in the course of its opinion say, that the plaintiff paid his money "to protect his property from a clouded title;" but it appears to me that the expression was a mere inadvertence.

The illegal collection or exaction of taxes, tolls or fees, by persons having official position or under color of office, are placed upon peculiar grounds, and for obvious reasons. Money paid upon a demand made under such circumstances, has been recovered back, when as between private parties, dealing upon equal terms, the action could not have been maintained.

In this case the plaintiff was under no such compulsion. At most, there was but a cloud upon his title, by reason of the sale and sheriff's certificate. The money was not paid to prevent this, for it was already a fact accomplished. True a conveyance from the sheriff to the defendant would follow in six months, unless the plaintiff redeemed, by the payment to the former of the purchase money. But the defendant did not demand this money of the plaintiff and could not collect it by law. The plaintiff having volunteered to become the successor in interest to the judgment debtor, sought to redeem the property from the effects of the sale. This was a privilege which the law gave it, to be exercised or not at its own option. The plaintiff was the actor.

Under these circumstances, one of two courses was open to it; either to resist the proceedings founded on the sale, on the ground of its illegality, or to submit to them and redeem.

John McCall v. Irwin McDowell.

In the former case the plaintiff could have had the sale set aside and the order therefor returned. The Court, where the proceedings were pending, had control over its officer and process, and upon the facts alleged would undoubtedly have given the plaintiff relief. And, in any event, it might have brought a suit in equity to set aside the conveyance and sale as illegal and a cloud upon its title.

But the plaintiff, instead of resisting this claim at the threshold, chose to pay the defendant the purchase money and redeem. Having made its election, without such compulsion as makes the payment in contemplation of law involuntary, it must abide the result, and cannot recover the money back.

The demurrer to the complaint is sustained.

John B. Felton, for plaintiff.

Clarke & Carpentier, for defendant.

CIRCUIT COURT, APRIL 25, 1867.

JOHN McCALL v. IRWIN McDOWELL AND CHARLES D. DOUGLASS.

In an action for false imprisonment where the arrest complained of was illegal, but was caused by the defendant, while acting as commanding officer of a military department of the United States, without malice or intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety, the plaintiff is only entitled to recover compensatory damages.

The defendant having caused the arrest and imprisonment of the plaintiff, who was a civilian and not amenable to military law, it was his duty to make provision against his being treated with undue harshness and severity, or subjected to any treatment or discipline not necessary and proper to restrain him of his liberty for the time being, and having failed to do so, and suffered the plaintiff to be confined in the guard house with drunken soldiers, and to be compelled to labor in common with military culprits, the damages for the false imprisonment must be enhanced on account of such treatment.

In an action for false imprisonment, the defendant by his gross and incendiary language on the news of the assassination of Abraham Lincoln, the

John McCall v. Irwin McDowell.

President of the United States, having provoked his arrest, though the same was illegal, such provocation must be taken into account in mitigation of damages.

A military subordinate is not liable in damages for making an illegal arrest, if he acted in pursuance of an order from his superior, which was legal on its face; the liability for the false imprisonment is confined to the officer who gave the order.

Congress is the exclusive judge of "when in cases of rebellion or invasion" the public service requires the suspension of "the privilege of the writ of *habeas corpus*;" in such case it may suspend the privilege of the writ generally or in particular cases; and it may suspend it directly, or it may commit the matter within the proper limits, to the judgment of the President of the United States.

The practical object of suspending the privilege of the writ of *habeas corpus* being to permit and authorize the arbitrary arrest and imprisonment of persons against whom no legal crime can be proved, but who may nevertheless be actively engaged in fomenting the rebellion or inviting the invasion to the imminent danger of the republic, it follows as a necessary consequence, that under the power "to make all laws which shall be necessary and proper to carry into execution" the power of suspension, Congress may pass any law necessary and proper to secure or obtain this end, unless expressly prohibited therefrom by the constitution itself.

Congress has power to protect officers and persons engaged or concerned in making arbitrary arrests and imprisonments, or arrests or imprisonments without ordinary legal warrant or cause, under the authority or in pursuance of an act suspending the writ of *habeas corpus*, by the passage of laws indemnifying such officers and persons against the ordinary legal consequences thereof, or declaring that they shall not be liable to an action or other legal proceeding therefor.

Semble, that an act suspending the privilege of the writ of *habeas corpus*, is itself a protection to the officers or persons engaged in making arrests and imprisonments thereunder, against any action or proceeding therefor by the party arrested or imprisoned.

The President of the United States has no power to suspend the privilege of the writ of *habeas corpus*, except as authorized and directed by Congress, and therefore the proclamation of September 24, 1862 (13 Stat. 730), so far as it undertakes to suspend such privilege, was unauthorized and void.

The act of Congress of March 3, 1863 (12 Stat. 755), authorizing the President to suspend the privilege of the writ of *habeas corpus*, and the proclamation of September 15, 1863 (13 Stat. 134), suspending the same in certain cases in pursuance of said act, do not justify or protect the defendant in causing the arbitrary arrest and imprisonment of the plaintiff, because not done in pursuance of the special authority or order of the President as by said act provided, but by the defendant of his own will and judgment, as a matter necessary as he conceived to preserve the public peace in his department.

Neither does the act of May 11, 1866 (14 Stat. 46) furnish a defence to the

John McCall v. Irwin McDowell.

action for the false imprisonment by the plaintiff, because in causing the arrest and imprisonment of the plaintiff, the defendant did not act under the order of "the President or Secretary of War" or other person, but in obedience to what was deemed public necessity.

This was an action for false imprisonment, and by the stipulation of the parties was tried by the Court without the intervention of a jury. The facts in the case are fully stated in the following findings of the Court:

First—That on June 1, 1865, the defendant, Charles D. Douglass, was a captain in the army of the United States, then serving in the State of California, and that such defendant as such captain was then acting as commander at a military post, called Fort Wright, in the county of Mendocino, and State aforesaid.

Second—That on the day and year aforesaid, at Potter Valley, in the day time, on the public highway, in the county and State aforesaid, the defendant Douglas did order and cause the arrest and imprisonment of the plaintiff John McCall, for the space of thirteen days; and that said defendant during the term of said imprisonment, did convey and transport the said plaintiff, in close custody, under a military guard, by the usual means of transportation, by land and sea, to the city of San Francisco, in the State aforesaid, a distance of one hundred and fifty miles.

Third—That the defendant, Douglas, on June 13, 1865, at San Francisco aforesaid; did deliver the plaintiff into the custody of the Provost Marshal of the United States, where his hands were confined and manacled, and from whence the said plaintiff was, by order of said Provost Marshal, transported in close custody, under a military guard, to a military post and fort, called Fort Alcatraz, situate upon Alcatraz Island, in the county of San Francisco, and State aforesaid.

Fourth—That said plaintiff was kept a prisoner in close custody, without manacles, under a military guard, in said Fort Alcatraz for the space of six days, and during such imprisonment was compelled and required by the persons having him in custody at said Fort Alcatraz, to perform

John McCall v. Irwin McDowell.

manual labor, in common with prisoners belonging to the military forces of the United States then confined at said fort, as a punishment for military offences.

Fifth—That during the years 1864 and 1865 the defendant, Irving McDowell, was a brigadier-general in the regular army of the United States and a major-general of volunteers in the military service of the United States; and that during such years such defendant was the commander of the military department of the United States, known as the Department of the Pacific, which department included the States of California, Oregon and Nevada, and the Territory of Washington, and that said State of California was a separate district of said department, and under the immediate supervision of a district commander—Gen. Wright.

Sixth—That on April 17, 1865, the defendant, McDowell, caused to be issued the following order:

HEADQUARTERS DEPARTMENT OF THE PACIFIC, }
SAN FRANCISCO, CAL., April 17, 1865. }
GENERAL ORDER No. 27.

It has come to the knowledge of the major-general commanding, that there have been found within the department, persons so utterly infamous as to exult over the assassination of the President. Such persons become virtually accessories after the fact, and will at once be arrested by any officer or provost marshal or member of the police having knowledge of the case.

Any paper so offending or expressing any sympathy in any way whatever with the act, will be at once seized and suppressed.

By command of Major-General McDowell.

R. C. DRUM, Assistant Adjutant-General.

Seventh—That at the date of such General Order No. 27, the populace of San Francisco was in a highly excited and tumultuous condition, on account of the assassination therein referred to, and had already proceeded to commit acts of violence upon the property of persons known to sympathize or suspected of sympathizing with the then existing rebel-

John McCall v. Irwin McDowell.

lion by the "Confederate States," against the United States, and still threatened in large numbers and with imposing force to continue such violence against both the persons and property of such sympathizers. That it then seemed highly probable that such excitement and disorder would extend throughout the department and result in unlawful strife and violence, destructive to the lives and property of the people, unless the military authority (which alone possessed the physical power) should summarily interfere to remove and restrain persons who should make themselves obnoxious to the popular sentiment by such exultations; and that such order was made and issued by the defendant, McDowell, reluctantly, and at the solicitation and upon the urgent request and advice of prominent and responsible citizens of San Francisco, for the reasons and causes above stated, as a means of preventing popular tumult and violence, and of preserving the public peace and order, and not from any desire or purpose upon the part of the defendant, McDowell, to molest, injure or oppress the plaintiff herein, or any other person, and without any malice or ill will towards the said plaintiff, or any other person whomsoever.

Eighth—That during the progress and existence of the rebellion aforesaid, and at the date of Order No. 27, it had been and was deemed necessary by the proper authorities to maintain and keep an organized military force throughout such department, to discourage and prevent acts of hostility therein, against the authority and power of the United States, and in aid of the rebellion aforesaid; and that the defendant, McDowell, when he issued Order No. 27 as aforesaid, had good reason to believe, and did believe that the peace and security of the department aforesaid would be seriously endangered unless public disturbances, growing out of the conflicting sympathies and antipathies engendered by the rebellion aforesaid and the war for its suppression, were prevented or promptly put down, and all causes or pretexts therefor removed.

Ninth—That the plaintiff herein was a native born American citizen, and that during the month of April, 1865, and

John McCall v. Irwin McDowell.

prior thereto, and at the date of the arrest aforesaid, was a resident of Potter Valley aforesaid, and was then and there engaged in farming and stock rearing, and that said plaintiff, on the public highway, in the day time, at Potter Valley aforesaid, on April 20, 1865, did publicly declare and say—"That Lincoln (thereby meaning the late President of the United States) was shot, and that the damned old son of a bitch should have been shot long ago, and that some more of his kind would go the same way shortly." And that the said plaintiff on the public highway, in the day time, at Potter Valley aforesaid, on April 29, 1865, did publicly declare and say: "That he did not believe that Gen. Lee had surrendered, and believed that Gen. Lee was still carrying on the war; and that he did not believe for a long time after hearing of the President's assassination that it was true; and said I am only afraid that it is not so—if three or four more of the leaders of the abolition party were killed, it would be a good thing, as it would be the downfall of that party."

Tenth—That the defendant, Douglass, arrested and imprisoned the plaintiff, as above stated, in obedience to General Order No. 27, aforesaid; and because, before making such arrest, the said defendant had information upon oath that the plaintiff herein had uttered the words above mentioned, as spoken by him on April 29, 1865; and also, that said defendant had information upon oath, upon the day of making such arrest, but some hours thereafter, that the plaintiff herein had uttered the words above mentioned, as spoken by him on April 20, 1865, and not from any desire or purpose upon the part of the said defendant, Douglass, to molest, injure or oppress the plaintiff herein, and without any malice or ill will towards the said plaintiff whatever.

Eleventh—That the defendant, McDowell, did not procure, advise or cause the arrest, imprisonment or detention of the plaintiff, otherwise than as above stated; and that said defendant subsequently issued an order, in obedience to which the said plaintiff was removed and discharged from Fort Alcatraz, as above stated, and turned over to the civil au-

John McCall v. Irwin McDowell.

thority, to-wit: the United States Marshal for the district of California, and that said plaintiff was then and there by said marshal taken before the District Court of the United States for the district aforesaid, when and where said plaintiff was by the order of said Court set at liberty, he first taking the oath of allegiance to the United States Government, as by act of Congress provided, entitled "an act relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March 3, 1863. (12 Stat. 755.)

Twelfth—That the plaintiff during his arrest and imprisonment as aforesaid, and on account thereof, was obliged to expend the sum of \$110 in money, of which said sum he paid \$25 to an attorney for services rendered to him in and about the matter of his discharge from such imprisonment; and that the said plaintiff did not sustain any special injury to his person or property by reason of such arrest and imprisonment.

Thirteenth—That for and on account of the loss of time and absence from home caused to the plaintiff by reason of such arrest and imprisonment, and for aid on account of the injury to his feelings and the bodily suffering and anxiety of mind necessarily resulting therefrom, the Court assesses the damages of the plaintiff, in addition to the sum above mentioned, at the sum of \$500.

And the Court finds, as a conclusion of law from the premises, that the defendant, Douglass, is not liable to the plaintiff as he hath complained against him, and that such defendant is entitled to judgment against the plaintiff in bar of this action, and for his costs and expenses in this behalf sustained. And the Court further finds, as aforesaid, that the defendant, Irving McDowell, is liable to the plaintiff as he hath complained against him, and that the plaintiff is entitled to have judgment against said last named defendant for the sum of \$635 damages, and his costs and expenses in this behalf sustained.

DEADY, J. On the trial of the issue in this action, the defendants were allowed to give evidence of the circumstances

John McCall v. Irwin McDowell.

attending the promulgation of Order No. 27, and the consequent arrest and imprisonment of the plaintiff, not as a justification, but in mitigation of damages. From the evidence the Court has found the fact to be, that the defendant, McDowell, issued the order which led to the arrest and imprisonment complained of, without malice or any intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety; and also, that the defendant, Douglass, acted in the premises without malice or evil intention, but in obedience to the order of his superior, and upon satisfactory information that the plaintiff's conduct had brought him within the purview of the order. These facts, although not sufficient to constitute a legal justification of the conduct of the defendants, are to be considered in estimating the amount of damages which the plaintiff is entitled to recover. The acts complained of, being done without the authority of law, the plaintiff, as a matter of law, is entitled to recover some damages therefor. But vindictive or exemplary damages are only given where it appears that the wrong complained of was done with an evil intention or from a bad motive. In the present case, no such intention or motive can be attributed or imputed to either of the defendants. It follows that the plaintiff is only entitled to recover damages for the necessary consequences of the act complained of—what the law calls compensatory damages.

Still, what are merely compensatory damages, in a case like this, is difficult of determination, and is, after all, a matter of opinion, not to say conjecture, rather than direct proof. The only loss which the plaintiff sustained, that can be at all accurately computed and compensated in money, is his loss of time and expenses. What his time was worth does not directly appear, and can only be inferred from his occupation and position in life. Allowing him for this, at the rate of five dollars per day for twenty-one days, which includes the two days that he was in the custody of the civil authorities, would make the sum of \$105, which added to his expenses and counsel fees, would amount to \$215. In

John McCall v. Irwin McDowell.

estimating the damages of the plaintiff, beyond this amount, there is no guide but the judgment, and the rule that they are to be given as a compensation to the plaintiff, and not as a punishment of the defendants or an example to others. In estimating the damages of the plaintiff beyond his expenses and loss of time, I have been materially influenced by the facts, that while in the custody of the provost marshal in San Francisco, he was confined one night in the common guard house in company with drunken soldiers, and that while he was in custody at Fort Alcatraz he was compelled to labor in common with military culprits. The treatment of the plaintiff in these respects, was, to say the least, oppressive and uncalled for. True, it does not appear that this was done with the knowledge or approbation of the defendant, McDowell, but, so far as appears, it would seem that he did not expect or intend that "political prisoners" should be required to labor while at Fort Alcatraz. The plaintiff was not in the actual custody of the defendant, McDowell, but of his subordinate, and his treatment in these respects was the direct act of the latter and not the former. Yet, McDowell, having caused the arrest and imprisonment, ought to be held responsible for whatever injuries and indignities the plaintiff suffered thereby, in consequence of his neglect or omission to provide against the same. The provost marshal's office and Alcatraz were within the command and under the authority of McDowell, and having caused the imprisonment of the plaintiff, he should have taken some precaution to prevent his being treated with undue harshness and severity while in custody at these places. In *Dinsman v. Wilkes* (12 How. 405), which was an action brought by a marine against Commodore Wilkes, for illegal imprisonment in a jail at Honolulu, the Supreme Court say, that "it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect." It is proper to add that the Court held Wilkes to something more than the ordinary responsibility of a commanding officer in that respect, because "he had placed him out of the protection which the

ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people." So it appears to me in this case, the plaintiff being a private citizen, not belonging to the military forces, nor under condemnation as a criminal, when the defendant, McDowell, caused him to be imprisoned with military culprits and persons subject to military law and discipline, it was his duty to provide that the plaintiff should not be confounded with them and treated like them. And although, as I have said, I am satisfied that the defendant, McDowell, neither expected or intended that the plaintiff should be subject to any treatment or discipline beyond what was necessary and proper to restrain him of his liberty for the time being, yet as such treatment and discipline were among the probable consequences of the plaintiff's confinement, when and where it took place, if not provided against by the department commander, I think he must be held responsible for it.

In considering the question of damages I have also taken into account the conduct of the plaintiff, which directly provoked his arrest. I refer to the gross and incendiary language uttered by him on the public highway, on April 20 and 29. Of course I do not mean to assert that the utterance of these words by the plaintiff, as the law then stood and still stands, was technically a crime. Such utterance did not constitute a crime, and therefore was not a legal cause of arrest. Yet in actions for injuries to the person, the misconduct of the plaintiff by which such injury is provoked is always considered in mitigation of damages. (2 Green. Ev. § 267.) Mere words do not constitute an assault, and therefore will not justify a battery, yet when the words are calculated to provoke and do provoke the battery, they may be given in evidence to mitigate the damages. If one calls another a liar, this does not justify an assault by the insulted party; yet if an assault follow in consequence of the insult, the provocation must be considered in estimating the damages. This rule, it seems to me, may be properly applied in this case. If the plaintiff had uttered these words in the immediate presence of Gen. McDowell, and the latter

John McCall v. Irwin McDowell.

had knocked him down on the instant, the law would have allowed the provocation to be shown in mitigation of the damages resulting from the illegal blow. In this case the arrest and imprisonment of the plaintiff, although without authority of law, was, I may say, procured and provoked by conduct on his part at once dangerous and disgraceful, and well calculated at that moment of intense public feeling and anxiety, to have brought harm on himself and trouble to the community. Talk and reason as we will about the liberty of speech, something is due to society from every reasonable being who enjoys its protection and privileges. At least, in such an hour of public sorrow and alarm as that which followed the assassination of the President of the republic, during the dangers of a civil war, the plaintiff, whatever his political prejudices or opinions, should have bridled his tongue so far as not to exult at the calamity of the nation, or mock at its fear.

I do not forget that on the trial the learned counsel for the plaintiff questioned the fact, whether the plaintiff used the language attributed to him by the witnesses, Purcell and Hale. The affidavits of these persons, upon which the arrest was made, have been read in evidence, and Hale, the witness to the words uttered on April 20, comes upon the stand, in the presence of the plaintiff, and testifies to the same effect as in his affidavit. There was nothing in the appearance or manner of the witness calculated to detract from his credibility. There was no contradictory testimony upon the point, either direct or circumstantial, and the Court sitting as a trier of the fact, could not have found it otherwise. But another circumstance makes it absolutely certain that the plaintiff substantially uttered the words imputed to him by these witnesses, as the Court has found. On the trial, the plaintiff was in Court and was examined as a witness in his own behalf, yet his counsel forebore to interrogate him upon this point. The natural and irresistible inference from this omission is, that the plaintiff was conscious of the truth of the charge, and was too honest to deny it if he had been examined concerning it.

John McCall v. Irwin McDowell.

In a case of so much importance as this, and being tried without a jury, I have deemed it proper and due to myself to submit the foregoing suggestions concerning the conclusions of fact found, before proceeding to consider the questions of law arising thereon.

This action has been tried upon the assumption, that Douglass is equally liable with McDowell, for the arrest of the plaintiff. Granting this, his liability cannot be extended beyond the time when he delivered him to the provost marshal in San Francisco. The imprisonment, so far as Douglass is concerned, then terminated. He did no further act in the premises, and he had no authority over those who did, nor is he in any sense responsible for what happened to the plaintiff thereafter. If the plaintiff had been killed by the guard while at Alcatraz, the defendant, Douglass, could as well be held liable for it, as for the imprisonment which the plaintiff suffered there. But I am not satisfied that Douglass ought to be held liable to the plaintiff at all. He acted not as a volunteer, but as a subordinate in obedience to the order of his superior. Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think, that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order or to the loss of his commission and disgrace for disobedience thereto. If Douglass is liable to the plaintiff, so is every private soldier who constituted his guard from Potter Valley to San Francisco, and even the almost unconscious sentry who stood guard at the prison of Alcatraz. Yet there was no alternative for either Douglass or these soldiers, but to do as they did, or refuse obedience to their lawful superiors, in a matter of which they were incapable of judging correctly, at the peril of disgrace and punishment to themselves. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and

John McCall v. Irwin McDowell.

soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they might consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

In *Martin v. Mott* (12 Wheaton, 30,) a question arose as to whether the President had authority to call out the militia in a particular exigency. A drafted militia man had refused to be mustered into the service of the United States, because, as he alleged, the President had made the order in a case not contemplated by the Act of Congress under which he professed to act. The Supreme Court held, "that the authority to decide whether the exigency had arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." The reasoning of the Court in support of this conclusion is peculiarly in point upon this branch of the case at bar:

"The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to a complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the

facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of State, which the public interest, and even safety, might imperiously demand to be kept in concealment."

The difference between that case and this is, that there the legality of the order depended mainly upon a question of fact, while here it depends upon a question of law. But the reasoning of the Court is equally applicable to both, for the same disasters and disorders may be expected, if subordinates and soldiers are allowed to disobey the orders of their superiors upon a difference of opinion upon a question of law. Again, how often would this difference of opinion be a mere pretext to escape the demands of duty? In the war of 1812, the *constitutional scruples* of the militia men, as to the power of the President to order them out of the United States, led to their refusing to march across the Canada line to the aid of the regulars, when the latter were seriously engaged with the enemy, and thus a well planned enterprise failed, with serious loss to the American forces.

Nor is it necessary to the ends of justice that the subordinate or soldier should be responsible for obedience to the illegal order of a superior. In any case, the party injured can have but one satisfaction, and that may and should be obtained from the really responsible party—the officer who gave the illegal order. In civil life the rule is well settled otherwise, and a person committing an illegal act cannot justify his conduct upon the ground of a command from another. But the circumstances of the two cases are entirely different.

In the latter case, the party giving the command and the one obeying it are equal in the eye of the law. The latter does not act upon compulsion. He is a free agent and at liberty to exercise his judgment in the premises.

John McCall v. Irwin McDowell.

Personal responsibility should be commensurate with freedom of action—to do or refrain from doing. For acts done under what is deemed compulsion or duress, the law holds no one liable. In contemplation of law, the wife is under the power and authority of the husband. Therefore, for even criminal acts, when done in the presence of the latter, she is not held responsible. The law presumes that she acted under coercion of her husband and excuses her.

If the law excuses the wife on the presumption of coercion, for what reason should it refuse a like protection to the subordinate and soldier when acting in obedience to the command of his lawful superior? The latter may be said to act—particularly in time of war—under actual coercion. As a matter of abstract law, it may be admitted, that ultimately the law will justify a refusal to obey an illegal order. But this involves litigation and controversy alike injurious to the best interests of the inferior, and the efficiency of the public service. The certain vexation and annoyance, together with the risk of professional disgrace and punishment which usually attend the disobedience of orders by an inferior, may safely be deemed sufficient to constrain his judgment and action, and to excuse him for yielding obedience to those upon whom the law has devolved both the duty and responsibility of controlling his conduct in the premises. True, cases can be imagined, where the order is so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed, by whomever given. But there is no rule without its exception. This one is practical and just, and the possibility of extreme cases ought not to prevent its recognition and application by the Courts.

Between an order plainly legal and one palpably otherwise—particularly in time of war—there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands and the necessities and efficiency of the public service require, that the order of the superior should protect

John McCall v. Irwin McDowell.

the inferior; leaving the responsibility to rest where it properly belongs, upon the officer who gave the command.

The all important question in this case yet remains to be considered.

The defendants maintain that the acts complained of in this action are within the purview of the act of Congress, entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March 3, 1863 (12 Stat. 755), and the act supplementary thereto, approved May 11, 1866 (14 Stat. 46), and that these acts furnish a complete defence to this action.

On the other hand, it is contended for the plaintiff, that the acts of the defendants are not within the purview of these statutes, and that each of said statutes, in so far as they purport to indemnify or protect officers and soldiers for an arrest or imprisonment made during the suspension of the habeas corpus, by the President in pursuance thereof, is unconstitutional and therefore void.

A question of greater importance, both to the government and the citizen—to the maintenance of the authority of the people on the one hand and the preservation of individual liberty on the other, was probably never submitted to the determination of a Court. Without further apology or preface, and without fear, favor or affection, I proceed to examine and decide it.

The constitution (Art. I, § 9, sub. 2) declares: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public service may require it." And also (Art. I, § 8, sub. 19) that: "The Congress shall have power, * * * to make *all laws which shall be necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

By the first section of the act of March 3, 1863, Congress authorized the President, during the rebellion, "to suspend the privilege of the writ of habeas corpus in any case, throughout the United States or any part thereof." The

John McCall v. Irwin McDowell.

constitutionality of the section must be admitted without argument. The clause of the constitution first quoted is a recognition of this power in Congress, as well as a limitation upon its exercise, to the occasions, "when," by reason of the existence of "rebellion or invasion the public service may require it." When the occasion arises—a rebellion or invasion—whether "the public service" requires the suspension of the writ or not, is confided to the judgment of Congress, and their action in the premises is conclusive upon all courts and persons. (*Ex parte Merryman*, 9 Am. L. R., 527; 2 Story Com. § 1342.) In the exercise of this power Congress may suspend the writ generally, or may limit the suspension to particular cases. They may suspend the writ directly, or commit the matter, within the properly described limits, to the judgment of the President.

Section 4 of the act of March 3, 1863, enacts: "That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest or imprisonment, made, done or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress; and such defence may be made by special plea or under the general issue."

On September 15, 1863 (13 Stat. 734), the President, in pursuance of the authority conferred upon him by section 1 of the act of March 3, 1863, issued a proclamation wherein it was declared that "the public safety does require that the privilege of said writ"—of habeas corpus—"shall now be suspended throughout the United States, in the cases where, by the authority of the President of the United States, military, naval and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers or seamen enrolled or drafted or mustered or enlisted in, or belonging to the land or naval forces of the United States, or as deserters there-

from, or otherwise amenable to military law or the rules and articles of war, or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offence against the military or naval service :

“Now, therefore, I, ABRAHAM LINCOLN, President of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the writ of habeas corpus is suspended throughout the United States, *in the several cases before mentioned*, and that this suspension will continue throughout the duration of the said rebellion, or until this proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked.”

Section 1, of the act of May 11, 1866 (14 Stat. 46), enacts: “That any search, seizure, arrest or imprisonment made, or any acts done or omitted to be done during the said rebellion, by any officer or person, under and by virtue of any order, written or verbal, general or special, issued by the President or Secretary of War, or by any military officer of the United States holding the command of the department, district, or place within which such seizure, search, arrest or imprisonment was made, done or committed, or any acts were so done, or omitted to be done, either by the person or officer to whom the order was addressed, or for whom it was intended, or by any other person aiding or assisting him therein, shall be held, and are hereby declared, to come within the purview of the act to which this is amendatory, and within the purview of the fourth * * * section of the said act of March 3, 1863, for all the purposes of defence * * * provided therein. But no such order shall, by force of this act, or the act to which this is an amendment, be a defence to any suit or action for any act done or omitted to be done after the passage of this act.”

Admitting the constitutional power of Congress to suspend the privilege of the writ of habeas corpus, as it was done by the Act of March 3, 1863, can it in any case go further, and pass acts to indemnify or protect persons, who, without ordi-

John McCall v. Irwin McDowell.

nary legal cause or warrant, have been instrumental in imprisoning others, during such suspension?

Before answering this question, it is well to consider what is the purpose and practical effect of suspending the privilege of the writ. Personal liberty, unless forfeited by due course of law, is the right of every citizen of the republic. The writ of habeas corpus is the remedy by which a party is enabled to obtain deliverance from a false imprisonment. Ordinarily, every one imprisoned without legal cause or warrant is entitled to this remedy—this privilege. The power to suspend this privilege includes, and is in fact identical, with the power to take away or withhold this remedy from the individual during the period of such suspension. The suspension of the privilege of the writ and the denial of the remedy for false imprisonment, are identical in effect, if not in terms. It follows that the power of Congress to suspend the privilege of the writ of habeas corpus, is equivalent to the power to take away from all persons, during the suspension, the right to the ordinary and only remedy for deliverance from false imprisonment. This is the effect of the suspension. What is the purpose of it? the object to be accomplished by it? The *occasions* and *necessity* to which the Constitution limits the power of suspension clearly denote the purpose and end for which the suspension is made. The *occasion* is the existence of “rebellion or invasion,” and the *necessity* is the fact that the “public service”—safety, requires it. The public safety is the end to be secured or obtained by the suspension. The danger to the public safety arises from the “rebellion or invasion;” and the writ is suspended to enable the executive to prevent harm to the republic from those who are or may be suspected of assisting the cause of the “rebellion or invasion.” The suspension enables the executive without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in fomenting the rebellion or inviting the invasion, to the imminent danger of the public safety.

John McCall v. Irwin McDowell.

Plainly expressed, the suspension of the privilege of the writ, is an express permission and direction from Congress to the Executive, to arrest and imprison all persons for the time being, whom he has reason to believe or suspect of intention or conduct, in relation to the "rebellion or invasion," which is, or may be dangerous to the common weal.

That at the time of the formation and adoption of the Constitution, such was the understanding, as to the purpose and practical effect of suspending the privilege of the writ, is apparent from the elementary common law treatises of the time. Blackstone in his *Commentaries*, (B. 1 p. 136), says: "Of great importance to the public is this personal liberty; for if once it were left in the power of any, the highest magistrate, to imprison arbitrarily whoever he or his officers thought proper, (as in France it is daily practiced by the crown) there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore, a more dangerous engine of arbitrary government. *And yet sometimes, when the State is in great danger, even this may be a necessary measure.* But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the Crown, by suspending the habeas corpus act for a short and limited term, to imprison suspected persons without giving any reason for so doing, as the Senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic

in any imminent danger. * * * In like manner, this experiment ought only to be tried in cases of extreme emergency; *and in these the nation parts with its liberty for a while, in order to preserve it forever.*"

It is evident, from the language of this passage, that the commentator was not disposed to undervalue the importance of personal liberty, nor to overstate the purpose and practical effect of the suspension of the habeas corpus act.

At the era of the Constitution, this was the acknowledged doctrine of the common law concerning personal liberty and the suspension of the privilege of the writ, whereby that liberty was left at the discretion of the government for the time being. The provision in our Constitution was adopted with that understanding of its effect. It in no wise changed the common law as laid down by Blackstone, except that, instead of leaving Congress at liberty to suspend the privilege "whenever it sees proper," it limited and confined the exercise of such power to times of "rebellion and invasion."

This is also evident, from the nature of things. If the suspension of the privilege of the writ is not intended to authorize and permit arrests without the ordinary legal cause or warrant, what it is intended for? The very limitation in the Constitution upon the power of suspension, is strong evidence that it was not understood to be a mere form, but something of serious import and effect. An arrest upon an oath and warrant describing an offence defined by law, can be made and maintained, with the privilege of the writ in force. Unless the suspension changes the law, so to speak, for the time being, in regard to arrests and imprisonments, I am at a loss to conceive how the republic can be thereby preserved from imminent danger, or the public safety conserved. The powers granted to Congress, must be construed and applied with reference to the purposes for which the Constitution was made. It is not a mere abstraction to sharpen men's wits upon, but a practical scheme of a government, having all necessary power to maintain its existence and authority during peace and war, rebellion or invasion. As was well said long ago, "The instrument was

not intended as a thesis for the logician to exercise his ingenuity on. It ought to be construed with plain good sense. The uniform sense of Congress and the country furnishes better evidence of the true interpretation of the Constitution, than the most refined and subtle arguments."

The purpose of the *express* power to suspend the privilege of the writ of habeas corpus—the object to be obtained being to authorize, for the time being, the imprisonment of persons "without giving any reason for so doing," and without legal cause or warrant therefor, as a means of preserving the republic from imminent danger, it follows as a necessary consequence, that, under the clause giving power "to make all laws which shall be necessary and proper for carrying into execution" the power of suspension, Congress may pass any law necessary and proper to secure or obtain this end, unless expressly prohibited therefrom by the Constitution itself.

Without further legislation than the suspension of the privilege of the writ, every person imprisoned without legal cause or warrant, might maintain an action for damages therefor. To enable the power of suspension to be executed—the purpose of it to be accomplished—it becomes *necessary* to provide in some way for the protection of the officers and persons required to make arrests and imprisonments. To accomplish this, Congress has passed the indemnity clauses in the acts of March 3, 1863, and May 11, 1866, being section 4 of the one act and section 1 of the other. Were these provisions in these acts *necessary* and *proper* means to secure the end in question? Let the Supreme Court answer this question. In *McCullough v. State of Maryland* (4 Whea. 415), Chief Justice Marshall says: "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to

John McCall v. Irwin McDowell.

the end. This provision is made in a constitution intended to endure for ages to come, and consequently, to be adopted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." And again:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution *must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.*"

It is not necessary to repeat what has been said to show the legitimacy of the end proposed by Congress in this legislation. Waiving the question of the propriety of the means for the moment, if this end is not legitimate, then the clause in the Constitution authorizing the suspension of the privilege of the writ is merely nugatory, and the power might as well have been absolutely denied.

As has been shown, the power to suspend the habeas corpus, in the cases specified, being practically the power to authorize and provide for the imprisonment of persons for the time being without legal cause or warrant, and "without

giving any reason for so doing," it must follow, that to secure this end, Congress must have power to protect or indemnify the officers and persons whom, mediately or immediately, it thus requires to do any act concerning such imprisonments.

The argument of the plaintiff may be briefly stated thus: "The suspension of the writ 'creates a despotism,' and therefore the end is not legitimate." Let it be admitted, for the purpose of argument, that the suspension does not "create a despotism." What then? Does the conclusion follow? By no means; because, as we have seen, the Constitution expressly authorizes the suspension, and history teaches, and so the fathers understood it, that such suspension was allowed, so as to authorize and permit imprisonment without the ordinary cause or process, for the safety of the republic.

Such an argument might have been proper as against the adoption of the Constitution by the people, but in a Court which must recognize that instrument—the suspending clause inclusive—as the supreme law of the land, it becomes a mere waste of opprobrious epithets.

Nor does this power as now construed merit such epithets. A despotism in any sense or form always implies the idea of *irresponsible* as well as unlimited power. The people of the United States made the Constitution for themselves, and can change it when they will, to suit their altered condition or change of opinions. While yielding obedience to their government, exercising the powers conferred by that instrument, whether ordinary or extraordinary, they cannot be said to be living under a despotism. When their representatives in Congress assembled, suspended the privilege of the writ of habeas corpus for the public safety, they only exercised a delegated power, for the proper use of which they are responsible to their constituents at short intervals. To call such a state of things a despotism is an abuse of language and a confusion of ideas. At most, it is but a voluntary and temporary surrender *by the people* of the ordinary safeguards of personal liberty in an "extreme emer-

John McCall v. Irwin McDowell.

gency," whereby as Blackstone says, "the nation parts with its liberty for a while, *in order to preserve it forever.*"

As a means to secure the purpose and practical end of suspending the privilege of this writ, does the Constitution anywhere prohibit Congress from passing the laws in question? He who asserts that it does must show it. I have been unable to find such a provision, and the counsel for the plaintiff, notwithstanding his learning and zeal, has failed to point it out.

It is not enough to show that the Constitution prohibits unreasonable searches and seizures, and the issuing of warrants without probable cause, supported by oath or affirmation. These provisions of the Constitution are qualified by the express power to suspend the privilege of the writ. The former furnish the general rule, while the latter takes effect in the excepted case of public danger in time of rebellion or invasion.

But these indemnity laws do not conflict with the Constitution in any of these provisions. They do not authorize any imprisonment with or without cause, but are enacted to protect an officer or person from an action for damages, on account of acts done in the defence of the public safety during the suspension of the writ—for imprisonments already made in pursuance of a law authorized by the Constitution.

It is admitted that the legislature of a State, by virtue of its general legislative power, unless specially prohibited therefrom, could pass laws barring the right of any of its citizens to maintain an action for an alleged assault and battery or false imprisonment. In the choice of means to carry out an express power, as the suspension of the writ, Congress may also exercise its discretion, and adopt any measure not specially prohibited by the Constitution. These means are necessarily the passage of laws, and one of the most appropriate for the purpose is to provide that the officer shall not be liable to an action. Another, and probably the only other, is to provide by law for the payment out of the public treasury of all judgments that may be recovered against officers by reason of any act done by them pending the sus-

John McCall v. Irwin McDowell.

pension of the writ, and in pursuance of the law authorizing or providing for such suspension. But Congress may adopt either of these means, as they may deem best. The Constitution commits the choice of means to them, and their decision in that respect is conclusive. In England, as I am advised, it has always been the practice to pass indemnifying acts to protect the executive officers from actions for damages, on occasion of suspending the habeas corpus act. (1 Wend. Black. 137n.)

But I am inclined to put the decision of this question upon higher and simpler grounds. It appears to me that these acts of Congress are merely declaratory of the law, as it resulted from the passage of the act suspending the privilege of the writ, and therefore necessarily constitutional. The suspension being the virtual authorization of arrests without the ordinary legal cause or warrant, it follows that such arrests, pending the suspension, and when made in obedience to the order or authority of the officer to whom that power is committed, are practically legal. They are made in pursuance of law—the law suspending the privilege of the writ. The municipal law declares in advance that homicide is justifiable when committed by an officer in obedience to the judgment of a competent court. In the absence of such a statute provision, what court would hold that such a homicide was illegal and criminal. It seems to result from the nature of things, that what the law commands or permits, so far as the law is concerned, is legal and justifiable.

It only remains to determine whether the defendants are within the provisions of the indemnifying acts. If they are, judgment must be given in bar of the action, and if not, it must go against them for the damages found.

Section 4 of the act of March 3, 1863, makes any *order or authority of the President*, made at any time during the existence of the present rebellion, a defence to any action for arrest and imprisonment, made *under and by virtue of such order*.

In the case at bar, no authority or order of the President

John McCall v. Irwin McDowell.

is shown for the imprisonment of the plaintiff. It is the *order or authority of the President* which the act makes a defence to the action. Such order or authority cannot be presumed but must be proved.

Counsel for the defendants seek to invoke the proclamation of September 24, 1862 (13 Stat. 735), in aid of the defendants in this respect. It may be admitted generally that a proclamation by the President is an order or authority to all whom it may concern or be addressed. Is this proclamation within the act of March 3, 1863?

That act declares that "any order of the President * * * made at *any term during the existence of the present rebellion*, shall be a defence," etc. Does this include orders made during the existence of the rebellion—as the proclamation of September 24, 1862—but prior to the date of its enactment? It must be admitted that the language of the statute, taken literally, is broad enough for that purpose. But I do not think it was so intended or should be so construed, and for this reason: Congress was by that act first authorizing the suspension of the privilege of the writ of habeas corpus. It was only as an appropriate means to this end that Congress could have made such orders a defence to an action for imprisonment. Where an act of Congress is equally susceptible of two constructions, the Court is bound to adopt that one which will make the act harmonize with the Constitution.

But, if I am mistaken in this, there is another answer to the proposition, that the proclamation is a defence to the action. That proclamation professes to suspend the writ of habeas corpus and to declare martial law. The expression *martial law*, may be passed over as merely cumulative. It means nothing but the absence of law. But the President of the United States has no authority to suspend the privilege of the writ, except as authorized and directed by Congress, and at the date of this proclamation no such authority existed. I do not propose to argue this question. There are some things too plain for argument, and one of these is, that by the Constitution of the United States the Presi-

John McCall v. Irwin McDowell.

dent has not the power to suspend the privilege of the writ, and that Congress has. The power of the President is executive power—a power to execute the laws, but not to suspend them. The latter is a legislative function, and so far as it exists, belongs naturally and by force of the Constitution exclusively to Congress. (See opin. of Ch. J. Taney in *ex parte Merryman*, 9 Am. L. R. 524.)

Whatever may have been the public necessities and motives which led the President to issue this proclamation, and I neither question nor impugn them, I cannot hold that it constitutes a defence to this action, because judicially I know that it was unauthorized and void.

Except as a means to secure the end and purpose of suspending the writ, Congress itself could not have authorized the President to make this proclamation, nor do I think, they could afterwards sanction it, so as to make it operate as a defence in a private action for an imprisonment made under it.

What is now said applies only to this action or similar ones. The proclamation of September 24, 1862, embraces many subjects and classes of persons. As to some of them or many of them, the President may have been authorized as commander-in-chief of the army and navy, to make the orders and directions therein. It declared that all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States, shall be "subject to martial law and liable to trial and punishment by courts-martial or military commissions." "The writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison or other place of confinement, by any military authority or by the sentence of any court-martial or military commission."

But if it were admitted that this proclamation was authorized by law and that it contained sufficient matter to

John McCall v. Irwin McDowell.

justify the defendant, McDowell, in causing the arrest of the plaintiff as he did, still I do not think it would be a defence to this action, because long before this arrest, it was superseded and practically revoked by the proclamation of September 15, 1863—the one authorized by the act of March 3, 1863.

The latter carefully defines the class of persons in relation to which the privilege of the writ was thereby suspended, and who might therefore be arrested and imprisoned, without legal warrant or cause. In the absence of particular proof the only general order that the Court can take judicial notice of is the proclamation of September 15, 1863. In this I do not find any order directing the arrest of the plaintiff, or that would justify his arrest. It is true that the proclamation suspends the writ as to “aiders and abettors of the enemy.” And it is apparent that this language was intended to apply to and include a class of persons whose conduct fell short of that “aid and comfort” to the enemy, which the Constitution declares to be treason, and which is legally punishable as such.

It is this class of persons that the suspension of the writ is intended to bring within the power of arbitrary arrest for the time being—persons who may be reasonably suspected of complicity with the rebellion or invasion, or who may be known to give it that moral aid and support which is often more effectual than a soldier in arms, particularly in a country governed by public opinion. But while the proclamation suspends the privilege of the writ as to such “aiders and abettors” as a class, does it authorize or order, any officer, military or civil, to arrest and imprison any particular person whom *he may believe* to be such an “aider or abettor,” without the special and further order or authority of the President for so doing? I think not.

The language of the proclamation is, that “in the judgment of the President, the public safety does require that the privilege of the said writ shall be suspended throughout the United States in the cases where *by the authority of the President of the United States*, military, naval and civil officers

John McCall v. Irwin McDowell.

of the United States, or any of them hold persons under their command or in their custody, either as prisoners of war, spies or aiders or abettors of the enemy," etc. This proclamation is in the nature of a law—it has the force of a law—and by it an important provision of the Constitution is suspended. It should then be construed and treated as a law—a rule of action. It prescribes the limits within which the writ shall be suspended. As to any of the persons included within these limits, when in the custody of an officer of the United States, *by the authority of the President*, the privilege of the writ is taken away. But I do not see how a person can be said to be in the custody of an officer, by authority of the President, unless the latter has directed or ordered the officer to take him into custody or to keep him in custody after having been arrested in any way. I admit that there is some room for argument upon the language of the proclamation, as to whether the instrument itself is to be construed as a general order to every officer of the United States, military, naval and civil, high or low, great or small, to arrest and imprison whomsoever they may *believe* to be "aiders and abettors of the enemy," or merely a declaration in advance, that whenever such a person is arrested or kept in custody by such officer, upon the order of the President—not the order of the subordinate—that as to him the privilege of the writ is suspended. But I think the latter construction altogether the most reasonable, and in accordance with the general spirit and purpose of the instrument. So upon general considerations outside of the language of the proclamation, there are many cogent reasons why it should be thus construed and applied. The power of arbitrary arrest and imprisonment, though sometimes absolutely necessary to the public safety, is a dangerous and delicate one. In the hands of improper persons it would be liable to great abuse. If every officer in the United States, during the suspension of the habeas corpus, is authorized to arrest and imprison whom he will, as "aiders and abettors of the enemy," without further orders from the President, or those to whom he has specially committed such authority,

John McCall v. Irwin McDowell.

the state of things that would follow can be better imagined than expressed.

It only remains to consider what is the effect of section 1 of the act of May 11, 1866. That act, as we have seen, makes the order of "the President or Secretary of War," or of "any military officer of the United States holding the command of the department, district or place within which" an "arrest or imprisonment was made," a defence to the action.

Under this section there can be no doubt but that the order of Gen. McDowell to Capt. Douglas, protects the latter for acting in obedience to it, and is a complete defence to the action so far as he is concerned.

At the same time it is equally apparent that it does not furnish a defence for Gen. McDowell. He is not shown to have acted upon the order of any one. The section proceeds upon the principle, which I have already attempted to show ought to be the law independent of the statute, that a military officer, when acting in obedience to the order of his superior, should not be liable to third persons therefor.

As it nowhere appears that Gen. McDowell was acting under the order of his superior, but rather in obedience to what was deemed public necessity, I must hold him liable to the plaintiff for the damages which the latter has sustained by reason of his unauthorized act.

The good motives of Gen. McDowell, and the necessities of the public, when he issued Order No. 27, as well as the gross misconduct of the plaintiff, have been duly considered by the Court in estimating the damages of the plaintiff. But these alone, however worthy or imperative, do not constitute a defence to the action. The act itself being unauthorized by any order or authority of the President, does not come within the scope of the proclamation of September 15, 1863, suspending the privilege of the writ, or the act of March 3, 1863, authorizing such suspension. Neither does it come within the purview of the act of May 11, 1866, as it was not done in obedience to the order of a superior.

The United States v. Isaac A. Davenport.

-Congress may relieve a meritorious officer against a loss incurred, while in the discharge of his duty to the public; but in this tribunal, whose only function is to administer the law as it finds it, the defendant must be held liable for the legal consequences of his act.

Judgment, that the plaintiff recover off the defendant, McDowell, the damages found by the Court, and his costs and disbursements, and in bar of the action as against the defendant, Douglass.

Henry P. Irving and George Pierce, for plaintiff.

Delos Lake, for the defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF
OREGON.

DISTRICT COURT, MAY 17, 1867.

THE UNITED STATES v. ISAAC A. DAVENPORT.

An indictment, in which there is a joinder of offences or offenders, so far as the jury are concerned, is to be considered as a several one as to each of such offences or offenders.

When an indictment contains two or more counts upon distinct offences or upon different statements of the same offence, the jury may find a verdict of guilty or not guilty upon any or all of such counts, and if there is any count upon which they are not agreed, they may be discharged without giving a verdict thereon; and such count will stand for re-trial.

DEADY, J. The defendant in this action was indicted for the crime of perjury, committed in swearing to his income returns for the years 1864 and 1865 respectively. The indictment contained two counts—the first upon the affidavit to the return for 1864, and the second upon the affidavit to that of 1865. Upon the trial the jury returned a verdict of “not guilty” as to the first count, and then and there stated to the Court that they were unable to agree as to the second one. The Court received the verdict and discharged the jury.

The United States v. Isaac A. Davenport.

The defendant now moves for judgment of acquittal generally upon this verdict, and that he be discharged.

No direct authority is cited in support of the motion, but counsel for defendant claim that a verdict of not guilty upon one count in an indictment, is in legal effect, equivalent to a verdict of not guilty upon all the counts therein. In support of this position the case at bar is likened to one where the jury *convict* on some counts and are *silent* as to others. In such cases it is said that the weight of modern authority is, that the verdict is equivalent to not guilty as to the counts concerning which the jury are silent. But the authorities are not uniform on this point, and the rule appears to have been "that if distinct offences are charged in separate counts of the same indictment, the verdict must expressly find the defendant either guilty or not guilty upon each count, or no judgment can be rendered." (2 Lead. Crim. Cas. 503.)

But in the case under consideration the jury are not silent as to the other count, but state expressly, that as to such count they cannot agree to a verdict either way.

The case of *Campbell v. The State* (9 Yerger 333), is cited and relied upon by counsel for defendant.

But there is no analogy between that case and this. There the indictment contained three counts. The crime charged was the larceny of a bank note. The jury found the defendant guilty as to the second count, and not guilty as to the first and second ones. On motion of the defendant, the verdict was set aside and a new trial granted. Whether the order of the Court setting the *whole verdict* aside, went beyond the motion of the defendant, does not appear.

On the second trial, the defendant was found not guilty as to the first and second counts, and guilty as to the third one. Judgment was given accordingly.

On review, the Court held, that the defendant having been found not guilty as to the third count on the first trial, could not be tried on that count again, and reversed the judgment.

All that this case decides is, that a verdict in favor of a defendant cannot be set aside, even upon his own motion,

The United States v. Isaac A. Davenport.

and that if it is, and he is subsequently convicted on the same count upon which the verdict set aside was found, it is erroneous.

In *The State v. Morris* (1 Blackford; 37), the defendant being found guilty on one count of an indictment, and not guilty as to the other, moved for a new trial. The motion being allowed, the whole verdict was set aside and the defendant put upon trial on both counts.

The defendant, Davenport, is charged with two distinct offences. Being "of the same class" they are properly joined in the same indictment. (10 Stat. 162). The jury have found a verdict upon one count—as to one offence—and disagreed as to the other. It is believed that no authority can be found for holding such a verdict to be equivalent to an acquittal on both counts. There can be no pretence that justice to the defendant requires that it should.

The general rule seems to be, that for all the purposes of a verdict, an indictment, in which there is a joinder of offences or offenders, is to be considered as a several and separate one, as to each of such offences or offenders. The jury may therefore find a verdict of guilty or not guilty as to some, and no verdict as to others, because they cannot agree thereon.

In *Commonwealth v. Fitz Wood et al* (12 Mass. 313), two persons were jointly indicted and tried for larceny. The jury came into Court and suggested that they had agreed upon a verdict as to one of the defendants, but were unable to agree as to the other. Objection was made by the Attorney General, to receiving a verdict unless upon the whole matter. But the Court polled the jury, and they answered that they found Wood not guilty, but could not agree as to the other. The verdict was received and Wood discharged, but as to the other defendant the indictment was continued for re-trial.

In that case there was a joinder of offenders, while here there is a joinder of offences. But in my judgment this difference in the facts makes no difference in the principle. The analogy between the two cases is complete.

The United States v. Isaac A. Davenport.

In the note to Campbell's case (2 Lead. Crim. Cas. 502), the subject of separate counts in an indictment is discussed. It is there maintained, that the separate counts in an indictment are to be treated as separate indictments, whether they are upon distinct offences in fact, or upon different statements in the same offence. Speaking of an indictment containing two counts, the note says: "*the jury may be discharged from the consideration of a count upon which they are not agreed, returning a verdict only upon the other.*"

This rule appears both just and practical, and it meets this case exactly. The defendant has been tried for two similar offences. The jury have found him not guilty as to one, but as to the other they were unable to agree. To have refused to receive this verdict would have been unjust to the defendant who was thereby acquitted of one of the charges, but to receive it and then treat it as a verdict of not guilty as to both counts, would be equally unjust to the prosecution.

As to the second count there is no verdict. The jury were unable to agree concerning the guilt or innocence of the defendant as to the crime therein charged. The indictment as to this count stands for trial as if a jury had never been impaneled in the action.

Judgment for defendant upon the first count of the indictment, and motion denied as to second one.

Joseph N. Dolph, for the plaintiff.

William W. Page, for the defendant.

Addison M. Starr v. Alexander Hamilton.

CIRCUIT COURT, JUNE 25, 1867.

**ADDISON M. STARR v. ALEXANDER HAMILTON AND
CHRISTINA E. HAMILTON.**

Prior to February 14, 1859, while Oregon was a territory, the common law being in force therein, the husband by reason of the marriage became seized of a freehold estate in all the lands in which his wife had an estate of inheritance during the coverture, which could be taken in execution by his creditors.

The Constitution of Oregon, which went into effect February 14, 1859, provides (Art. XV, § 5) that certain property of every married woman "shall not be subject to the debts or contracts of the husband:" *Held*, that this provision had the effect as to third persons at least, to make such property thereafter the wife's separate property.

The separate property of a married woman is that of which she has the exclusive control and benefit, and its character as such must be imparted to it by the instrument or power by which the wife acquires the property.

Property conveyed to a wife and her heirs by her then husband, by an ordinary deed which contains no terms, from which it appears that it was the intention of the grantor to exclude the husband, as such, from the benefit and control of it, is not, by operation of such deed, her separate property.

The constitutional provision aforesaid concerning certain property of married women was not intended to operate retroactively, so as to affect rights already vested in the husband; and by Article XVIII, § 10, of the Constitution, is prevented from so doing, if it otherwise would.

Marriage is not a contract within the purview of the National Constitution, but a civil institution or relation, to be regulated and controlled by law, so far as the rights of the parties thereto in the property of each other is concerned; and until these become vested interests the legislative power may regulate the subject from time to time, to suit the wants of society, or the interests of the parties to the relation—therefore the provision aforesaid in relation to the property of married women applies to marriages existing when it went into force, so far as after acquired property is concerned.

Money loaned by the wife to her husband in 1857, which came to her by the sale of real property inherited before that time, was, by virtue of the marriage, the property of the husband, and therefore where property was afterwards purchased by the husband and the conveyance therefor taken to the wife for the ostensible purpose of reimbursing the latter, it is a gift from the husband, and not a purchase by the wife.

A gift to the wife from the husband, he acting in good faith and being solvent at the time, is within the provision of the Constitution of Oregon (Art. XV, § 5) concerning the property of married women, and is therefore not "subject to the debts and contracts of her husband."

This was an action for the recovery of the possession of real property in the city of Portland, and by the stipulation

Addison M. Starr v. Alexander Hamilton.

of the parties, was tried by the Court without the intervention of a jury. The facts of the case are stated in the findings of the Court as follows:

I. That the defendants, Alexander Hamilton and Christina Hamilton, were intermarried in the year 1853, at Portland, Oregon, and that the relation of husband and wife has ever since subsisted between such defendants.

II. That on July 1, 1859, the defendant, A. Hamilton, together with certain other persons, made his promissory note to the plaintiff herein, for the sum of one thousand dollars with interest, at the rate of three per centum per month thereon; and that afterwards, on March 21, 1865, in the Circuit Court for the county of Clackamas, State of Oregon, the plaintiff herein, in a suit against the defendant, A. Hamilton, and the others aforesaid, upon said promissory note, duly recovered a judgment therein against the said defendant, A. Hamilton, for the sum of two thousand five hundred and ninety-nine dollars.

III. That on July 27, 1866, a writ of execution was duly issued out of the clerk's office of the Court aforesaid, against the property of the defendant, A. Hamilton, and directed to the Sheriff of Multnomah county, State of Oregon; and that in pursuance of the command of said writ, the Sheriff aforesaid, did, on July 30, 1866, duly levy on the real property described in the complaint of the plaintiff herein; and that said Sheriff did, on September 4, 1866, in pursuance of said levy, duly expose to sale at public auction, the real property aforesaid, at which sale the plaintiff herein became the purchaser thereof.

IV. That on March 26, 1867, the Court aforesaid made an order confirming the sale aforesaid in all respects; and that afterwards on June 6, 1867, the Sheriff aforesaid in pursuance of the aforesaid order and proceedings, duly executed and delivered to the plaintiff herein, a deed, whereby he conveyed to said plaintiff all the right, title and interest, which the defendant, A. Hamilton, had in and to the real property aforesaid, on September 4, 1865, or at any time afterwards.

Addison M. Starr v. Alexander Hamilton.

V. That prior to the marriage of the defendants as aforesaid, Christina Hamilton, inherited from her mother a piece or parcel of real property, situate in the State of Missouri; and that in July, 1857, she sold and conveyed the same to her brother for the sum of one thousand dollars, receiving from her said brother at the same time the additional sum of two hundred dollars, in payment for the prior use and occupation, by her said brother, of said real property.

VI. That on February 13, 1858, in consideration of the sum of five hundred dollars paid by Christina Hamilton, Daniel H. Lownsdale did, by his deed duly executed and delivered, convey to said Christina Hamilton the real property, described in the complaint of the plaintiff herein as block two hundred and fifty, to have and to hold the same to her and the heirs of herself by the defendant, A. Hamilton forever; and that the said five hundred dollars paid to Daniel H. Lownsdale as the consideration for the conveyance of block two hundred and fifty as aforesaid, was a part of the twelve hundred dollars, paid by the brother of Christina Hamilton as aforesaid.

VII. That on September 5, 1865, in the consideration of the sum of seven hundred dollars paid by Christina Hamilton, Moses H. Young and Francis, his wife, did, by their deed duly executed and delivered, convey to Christina Hamilton, and to her heirs of her body, by her husband, A. Hamilton, the real property described in the complaint of the plaintiff herein as lots three, five and six, block two hundred and fifty-three, to have and to hold to her and her heirs by her then husband to her and their own proper use and benefit and behoof forever, free from all control of her said husband.

VIII. That on August 9, 1864, in consideration of the release to Thomas Robertson, by Christina Hamilton, of her right of dower in blocks two hundred and fifty-one and two hundred and fifty-two, in the town of Portland, State of Oregon, the said Thomas Robertson and Mary, his wife, did, by their deed duly executed and delivered, convey to said Christina Hamilton, and to her heirs of her body, by

Addison M. Starr v. Alexander Hamilton.

her said husband, A. Hamilton, the real property described in the complaint of the plaintiff herein, as lot four in block two hundred and fifty-three, to have and to hold to her said heirs as aforesaid, to her and their own separate use, benefit and behoof forever, free from all control of her said husband.

IX. That the defendant, Christina Hamilton, did not receive from any source or person other than her husband, during her marriage with the defendant, A. Hamilton, any money or property other than the sum of twelve hundred dollars as aforesaid, and that of said sum on or about the time of receiving the same, she loaned seven hundred dollars to the defendant, A. Hamilton, who invested the same in his own name in real property, namely, block two hundred and fifty-one and two hundred and fifty-two aforesaid, which property was subsequently and prior to the date of the deed aforesaid from Thomas Robertson and wife, taken on execution and sold to satisfy a debt of said defendant, A. Hamilton.

X. That on March 28, 1866, the defendant, Christina Hamilton, in pursuance of an act of the legislative assembly, approved June 4, 1859, did duly execute and cause to be recorded in the proper office in the county of Multnomah, State of Oregon, a declaration of her intention to hold, possess and enjoy in her own right and as her separate property, all the real property mentioned and described in the complaint of the plaintiff therein.

XI. That the defendants, A. Hamilton and Christina Hamilton, on September 4, 1866, were in the possession of the premises described in the complaint of the plaintiff herein, and have continued in the possession of the same up to the present time, and that the monthly value of the use and occupation of block two hundred and fifty, from September 4, 1866, was fifteen dollars, and of the lots in block two hundred and fifty-three, twenty dollars per month.

And as a conclusion of law from the premises aforesaid, the Court finds that the plaintiff has no estate or interest in lots three, four, five and six in block two hundred and fifty-

Addison M. Starr v. Alexander Hamilton.

three described in the complaint herein, and is not entitled to the possession of the same or any part thereof, but that the same is the separate property of the defendant, Christina Hamilton, and was so since the date of the conveyance of the same to her as aforesaid, and further, that the plaintiff, since September 4, 1866, was seized of an estate for the life of the defendant, A. Hamilton, in block two hundred and fifty, described in the complaint herein, and that he is entitled to the possession of said block during the continuance of such estate, as against the defendant herein; and that said plaintiff is entitled to recover off the defendant, A. Hamilton, the sum of one hundred and forty-seven dollars for the use and occupation of said block since September 4, 1866, together with the costs and disbursements of this action to be taxed; and that he should have judgment accordingly.

DEADY, J. By virtue of the sheriff's sale, on September 4, 1866, and the subsequent deed to the plaintiff, in pursuance of the order confirming such sale, the plaintiff acquired all the estate or interest which the defendant, A. Hamilton, had in the real property described in the complaint at the time of such sale.

What then was the interest, if any, of A. Hamilton in the property in question on September 4, 1866?

Block two hundred and fifty was conveyed to the wife, Christina Hamilton, on February 13, 1858. At that time the effect of marriage upon the property of the wife was regulated and prescribed in Oregon by the rules of the common law. By the common law, the husband, by reason of the marriage, became seized of a freehold estate in all the lands in which the wife had an estate of inheritance. (*White v. White*, 5 Barb. 474, 481; *Snyder v. Snyder*, 3 Ib. 621; 2 Kent's Com. 108; 2 Bac. Ab. 695, 705.) This freehold estate, which the common law gave the husband in the lands of his wife, was his absolute property, as much as though it had been conveyed to him by his wife before marriage. It could be seized and sold on execution by the creditors of the husband. (2 Kent's Com. 110.)

But it is claimed on behalf of the defendant, Christina Hamilton, that the Constitution of this State has worked a change in the law in this respect, which is applicable to this case.

The Constitution (Art. XV, § 5), provides—"The property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed for the registration of the wife's separate property."

Independent of the constitutional provision, the property of the wife is not necessarily her *separate* property or estate. "The separate estate of a married woman is that alone of which she has the exclusive control and benefit, independent of the husband, and the proceeds of which she may dispose of as *she* pleases; and its character as such must be imparted to the property by the *instrument* (or *power otherwise*) by which she is invested with such right to it." (Cord's Mar. Wom., § 225.)

The *instrument* by which block two hundred and fifty was conveyed to Christina Hamilton did not in any degree impart to it the character of separate property. It is but an ordinary deed, conveying the property to her and heirs by her husband, and contains no terms from which it can be inferred that it was the intention of the grantor to exclude the husband, as such, from the benefit and control of it. For aught that appears in the deed, the property was conveyed to the wife, subject to the general marital rights of the husband as then prescribed and defined by law.

Looking then to the nature of the *instrument* by which block two hundred and fifty was conveyed to the wife, and the law as it stood at the time of such conveyance, there can be no doubt but that the husband then became seized of a freehold estate in the same, which could be taken on execution by his creditors. The fact that the purchase money was derived from the sale of the wife's real property in Missouri, which she inherited from her mother, does not affect the question. That was not her separate property. It

Addison M. Starr v. Alexander Hamilton.

was her general property and subject to the marital rights of her husband, at the time of the marriage in 1853. Moreover, by the sale of it in 1857, it was converted into personal property—money—and upon the receipt by him became the absolute and exclusive property of the husband.

The Constitution went into force on February 14, 1859. What affect did it have upon the rights of the husband in this property? The Constitution makes provision for the registration of the wife's separate property, but does not declare in express terms what shall be considered such separate property. The contemplated registration is not for the benefit of the wife, but for the protection of the public. Still it is evident that the Constitution intended to change the law on the subject of the wife's property, and to change in favor of the wife. This being the case, it is the duty of the courts to give effect to such purpose so far as it can be ascertained with reasonable certainty. If the Constitution had said—"The property and pecuniary rights of every married woman," etc., *shall be deemed to be her separate property, or shall be held by her as her separate property*, no doubt could arise as to the legal effect of the language employed. This would have imparted a particular character to her property, so far as enumerated in the Constitution, however acquired; the effect of which would have been to have excluded her husband from all control over it or benefit in it. The language actually employed in the Constitution is—"*Shall not be subject to the debts or contracts of the husband.*"

- Taken in connection with the following clause, providing for the registration of the wife's separate property, I think these words ought to be construed, so far at least as third persons are concerned, as equivalent to a declaration that the property enumerated in section 5 shall be the separate property of the wife. If the wife's property is not to be "subject to the *debts or contracts* of the husband," he is thereby precluded from any control over it, and if he has any benefit or interest in it, it is beyond the reach of his creditors, for it is not "subject to his *debts or contracts.*" This seems to be the conclusion of the Supreme Court of the State in

Addison M. Starr v. Alexander Hamilton.

Brummet v. Weaver (2 Or. Rep. 168). Any narrower construction than this would defeat the evident intention of the Constitution to change the law concerning the effect of marriage upon the wife's property in favor of the wife. If, notwithstanding the provision in the Constitution, the husband, by reason of the marriage, is still invested with a freehold estate in his wife's lands, then it may be well said, as maintained by the plaintiff, that *such* estate—the property of the husband—may be taken on execution by the creditors of the husband, without conflicting with the provision in the Constitution concerning the *property of the wife*. Such a construction would leave the subject as it stood at common law, without giving any effect to the Constitution whatever. For these reasons I think that the property of the wife, as enumerated or described in the Constitution, ought to be considered her separate estate in the technical sense of that term—property over which the husband acquires none of the marital rights known to the common law.

At the time the Constitution went into force and from the date of the conveyance to the wife, the husband had a freehold estate in block two hundred and fifty. This was a vested right. Could the Constitution take it away from him and give it to the wife, or should it be so construed?

The act of April 7, 1848, of the New York Legislature, for the more effectual protection of the property of married women, so far as it related to existing rights of property, in married persons, was declared unconstitutional and void by the Courts of that State. (*White v. White*, 5 Barb. 474; *Westervelt v. Gregg*, 2 Kernan, 202.) These decisions maintain, that the rights of the husband in the property of the wife at the time of the passage of the act were vested rights to property, of which he could not be deprived, except by due process of law—forensic trial and judgment. But this conclusion was put upon the ground of the prohibition contained in the Constitution of the State of New York: “No person shall be deprived of *life, liberty or property*, without due process of law;” while in the case at bar, the enact-

ment under consideration is a part of the Constitution itself—the supreme law of the land.

Whether the people of a State in the formation and adoption of a Constitution are omnipotent or not is an unsettled question. Probably they ought to be held so, in the same sense in which the English parliament is deemed omnipotent—as having power to “do every thing that is not naturally impossible.” (1 Black. Com. 161.) They are for the time being the supreme sovereign power of the State, and the Constitution is their direct, definite and permanent will, expressed in the form of a law.

But I do not deem it necessary to pass upon this question, because I am satisfied that the provision in the State Constitution was not intended and does not operate retroactively. It is a general and salutary rule of the common law, that “no statute is to have a retrospect beyond the time of its commencement” (6 Ba. Ab. 370); and this rule applies in the construction of a Constitution as well as a statute. In the construction of statutes, courts are to take “as a leading guide, * * * the presumption that all laws are prospective and not retrospective,” *Dash v. Van Kluck* (7 John. 486); and Kent Ch. J. (Id. 502) says: “The very essence of a new law is a rule for future uses.”

The language of the Constitution is in no sense retrospective. It declares a new and important rule of property, as to married persons, and this rule, at least in the absence of express words to the contrary, should be construed as only intended to be applied to “future cases.” I understand that the learned Justice of the Supreme Court of the State, from the fourth district, has, on the circuit, construed this provision of the Constitution as being prospective. I am not aware of any decision of the Supreme Court of the State on the subject.

But I think the last clause of Sec. 10, Art. XVIII, of the Constitution, confines the operation of this provision to future cases. Section 10 is the saving clause of the new Constitution. It declares that the property and right of the territory and political subdivisions thereof shall remain “as if

Addison M. Starr v. Alexander Hamilton.

the change of Government had not been made; *and private rights shall not be affected by such change.*" The freehold estate of the husband in block two hundred and fifty was vested in him before and at the time this change was made. The enjoyment and ownership of this estate was then a private right in the husband—a right of property—and as such is protected by this saving clause, even if there was any doubt as to the true construction of Art. XV, § 5.

The registration of this property, on March 28, 1866, so far as block two hundred and fifty is concerned, availed the wife nothing. In fact she had no separate property in that block to protect by registration. The plaintiff having succeeded by purchase to the estate or interest of the husband in block two hundred and fifty, is entitled to the possession of the same. The duration of this estate is for the life of the husband, for although at common law, this estate might terminate with the death of the wife, for want of issue born alive, yet by our statute the husband is tenant by the courtesy, "although such husband and wife may not have had issue born alive." (Or. Code, 717.) As the defendants wrongfully withhold the possession from the plaintiff, he must have judgment against them accordingly, and against the defendant, A. Hamilton, for damages for the use and occupation of the property since September 4, 1866, according to the findings of the Court.

As to the lots three, four, five and six in block two hundred and fifty-three, the facts are different. They were conveyed to the wife after the Constitution went into force, and by force of the Constitution and the registration of March 28, 1866, must be held to be the wife's separate property, unless the following objections of the plaintiff or some of them are sufficient to take the case out of the Constitution.

1. The Constitution can only apply to future marriages, for by the obligations of the marriage contract entered into before the Constitution, the husband was entitled to a freehold estate in all estates of inheritance which the wife might acquire during coverture :

2. The property in these lots was acquired by purchase,

• Addison M. Starr v. Alexander Hamilton.

and property acquired by the wife after marriage is not declared to be separate property by the Constitution, unless acquired by *gift, devise or inheritance*:

3. If these lots can be said to be acquired by gift, it was the gift of the husband to the wife, and on grounds of public policy the Constitution should be so construed as to exclude such gifts from the category of separate property.

The first of these objections raises the question, long mooted, as to whether marriage is a contract within the provision of the National Constitution which forbids any State from passing a law impairing the obligation of a contract. I do not think this objection well founded. Marriage has its inception in contract—the assent of the parties—but when established it becomes a relation. This relation is in no sense a contract. It is rather a civil institution, beyond the control or caprice of the parties to it, to be governed and regulated by law. This law, and not contract, regulates and prescribes the rights of the parties in the property of each other, and until these become vested interests, the legislative power may modify them from time to time, to suit the convenience and wants of society, or to promote the relation or to protect the parties to it. In my judgment the Constitution should be construed, as applicable to marriages in existence when the Constitution went into force, so far as the after acquired property of the wife is concerned. (See *White v. White*, and *Snyder v. Snyder*, *supra* 477, 623.)

The second objection is not free from difficulty. Strictly speaking the real property can only be acquired by *purchase* or *descent*. “Descent is the title whereby a person, upon the death of his ancestor, acquired the estate of the latter as his heir at law.” (Bouv. Dic. 448.) The title to real property acquired in any other manner than by descent is title by purchase. The phrase in the Constitution “by inheritance, is in legal parlance the exact equivalent of “descent.” Title, or acquisition *by gift or devise*, is in law a title by purchase. The Constitution cannot be construed to prevent the wife in any case from holding as her separate property that which she acquires during marriage by purchase in

the legal sense of that term. It expressly includes acquisitions by *gift* or *devise*, and in law these are both deemed titles by purchase.

But I suppose the Constitution could not be construed to include property acquired by the wife by purchase in the popular sense—that is when the title was obtained for a valuable consideration moving directly from herself, unless the purchase consist as a matter of fact in the exchange or investment of already acquired separate property for some other.

However, upon the facts, in my opinion, the title to these lots was not acquired by the wife by purchase in the popular sense. It must be presumed that the consideration proceeded directly from the husband. The wife had no separate property out of which to make the purchase. The seven hundred dollars which she loaned (as she calls it) her husband in 1857, was already his property by virtue of the marriage. The consideration paid for these lots being just seven hundred dollars, it is evident that as between the husband and wife the purchase was made for the purpose of returning to the latter the remainder of the money that he had acquired by the sale of her Missouri property. In this view of the matter, the transaction is substantially a gift to the wife from the husband.

The third objection assumes that a gift from the husband to the wife is against public policy. The language of the Constitution is unqualified—property acquired by *gift*. As the law stood before the Constitution, the husband could give property to his wife, though for other reasons it was necessary to resort to the intervention of a trustee. It should be remembered also, that in this case, there is no question of fraud or rights of creditors. The plaintiff claims as the purchaser of the husband, and only acquired the rights of the latter as against the wife. Where a husband in solvent condition and in good faith makes a gift to his wife, I know of no rule of law or principle of public policy that can be invoked to declare the same void.

Besides, whatever may *have been* the law or public policy,

Addison M. Starr v. Alexander Hamilton.

I do not see how any court can presume to limit or restrict the language of the Constitution, and hold that the unqualified words—*acquired by gift*—shall have effect only in the diminished sense—by gift from some person other than her husband. This would be *legislation* and not *construction*—and legislation on mere grounds of public policy, a matter for the law maker to determine and not the Courts.

I am of the opinion, that the lots in blocks two hundred and fifty-three are a gift from the husband to the wife, and that by force of the Constitution and the registration of March 28, 1866, they became the separate property of the latter. This being the case, the plaintiff acquired nothing by his purchase of the husband's interest at the Sheriff's sale, for the simple reason that the latter had no interest in the property—at least no interest which could be the subject of levy and sale on execution.

In the consideration of lots in block two hundred and fifty-three, I have omitted to make special mention of lot four. The consideration for the conveyance of this lot to the wife was her release of her right of dower in certain other property of the husband's which had been taken and sold on execution. This right of dower was a mere contingency, depending upon whether the wife survived the husband or not. The estate of the tenant in dower is neither acquired by gift, devise or inheritance. The contingent right to dower in the lands of the husband, which the wife has during the life of the latter is a mere expectancy and cannot be called her separate property—if it can be termed property at all. Money derived from the sale of such right becomes the property of the husband. When the husband joined with the wife in the release of the right of dower to Robinson, in consideration that Robinson then conveyed to the wife lot 4, I think he appropriated the proceeds or value of the right of dower to the purchase of that lot, and made a gift of it to the wife.*

It may also be noticed, that by the terms of the convey-

*See *Dick v. Hamilton et al.*, *post*.

The United States v. J. F. Walsh.

ance, granting the lots in block two hundred and fifty-three to the wife, it is provided that she shall hold them to her own separate use and benefit, and free from the control of her husband. Whether this form of conveyance was not sufficient to make this the separate property of the wife, independent of the provision of the Constitution, I do not decide. The question was pressed upon the Court by the counsel for the defendants, but the conclusion to which I have arrived renders it unnecessary to consider it.

Judgment must be given for the plaintiff, in accordance with the conclusion of law in the findings of the Court.

W. W. Page, for plaintiff.

W. Lair Hill, for defendant.

DISTRICT COURT, JULY 23, 1867.

THE UNITED STATES v. J. F. WALSH.

The Court has not judicial knowledge whether there are matches known to the arts and commerce other than those called *lucifer* or *friction*, and therefore not subject to duty.

Where the cause of action and arrest are identical, a verified complaint is a sufficient affidavit upon which to allow an order of arrest.

The *conditions* and *restrictions* imposed by State law upon the allowance of imprisonment for debt, subsequent to the act of January 14, 1841 (5 Stat. 410), are not adopted by such act; and, therefore, not in force in the United States Courts, unless adopted as a rule thereof.

The clause in the Constitution of the State of Oregon (Art. I, §19), prohibiting "imprisonment for debt, except in cases of fraud," construed not to apply to an action for a tort or penalty, but only to cases of debt arising upon contract, express or implied.

A manufacturer of matches who disposes of the same without stamping them, as required by law, thereby commits a fraud upon the United States, and in an action by the latter to recover a penalty for such violation, the defendant may be arrested as in an action for a debt incurred by fraud.

This was an action brought to recover sixteen penalties of \$50 each off the defendant for making, preparing and selling

lucifer matches, without stamping the same, contrary to the Internal Revenue Act of July 13, 1866 (14 Stat. 144). The action was commenced by filing the complaint on May 23, 1867, and on the same day an order for the arrest of the defendant was allowed. On May 27, the defendant was arrested and gave bail in the sum of \$800, and on July 10, his attorney filed a motion to vacate the order.

The motion was made and argued as the cause was called for trial, but the trial proceeded and the decision of the motion was reserved for consideration. On the trial the plaintiff had a verdict for \$800.

DEADY, J. The grounds of the motion to vacate the order of arrest in this case are:

1. Because the order was improperly made.
2. Because the affidavit was insufficient.
3. Because there is no undertaking for the writ.

The complaint is verified by the oath of the informer, S. P. Reed, and charges that the defendant, on April 22, 1867, did manufacture and sell eight packages of friction matches, without stamping the same, or either of them, as required by the statutes of the United States; and, also, that on May 1, 1867, did in like manner manufacture and sell eight other packages of friction matches.

At the time of allowing the order of arrest there was also filed the separate affidavit of the informer, containing substantially the same facts as the complaint, except that the articles therein alleged to have been manufactured and sold, were described simply as *matches*, without being designated as either *lucifer* or *friction* matches.

Section 9, of the Internal Revenue Act, of July 13, 1866 (14 Stat. 144), requires that *lucifer* or *friction* matches shall be stamped as prescribed in schedule C, and imposes "a penalty of fifty dollars for every omission to affix such stamp."

Counsel for the defendant maintains, that this affidavit is insufficient to authorize the order of arrest, because it does not specifically allege that the matches manufactured, and sold by the defendant without stamps, were either *lucifer* or *friction* matches.

The only kind of matches subject to stamp duty under the Internal Revenue Act, is by that act designated or called *lucifer* or *friction* matches. Whether there are any other kinds of matches known to the arts or commerce, which are not subject to such duty, is a question of fact, of which I cannot take judicial knowledge. Ought I, in the absence of proof *pro* or *con*, to presume that there are other kinds of matches, not subject to duty, and that therefore the act stated in the affidavit, may or may not be cause of arrest? I incline to think not. But admitting for the purpose of the argument that the affidavit is insufficient for want of certainty in this particular, it cannot affect this motion. Where the cause of action is sufficiently set forth in the complaint, and the cause of action and arrest are identical, there is no necessity for an additional or separate affidavit to authorize the order for an arrest. In this case, the cause of action and arrest are identical, and the statement of the facts in the complaint is sufficient for either purpose. The order allowing the arrest of the defendant may be made when it appears by affidavit, that a sufficient cause of action and arrest exists. (Or. Code, 165.) Upon the same principle, an execution is allowed against the body, without affidavit or other proof than the record, when it appears from the record that the cause of action, on account of which the judgment was given, was also a cause of arrest. (Or. Code, 210.)

The statute only requires that the facts necessary to authorize the order of arrest shall appear by *affidavit*. If the complaint shows a cause of action and no more—as that the defendant is indebted to the plaintiff for money loaned—then it would be necessary to show by affidavit in addition to the complaint, that a cause of arrest exists also—as that the defendant obtained the loan by fraud.

The statute should not be so construed as to require the plaintiff to do a useless act to obtain the order. A verified complaint is in this respect an affidavit. It is a statement of facts, verified by the oath of the party making it. If it appears from such a complaint that there exists against the

The United States v. J. F. Walsh.

defendant both a cause of action and arrest, enough is shown to justify the order of arrest.

The objection that no undertaking was given for the writ, to indemnify the defendant, will be next considered. The subject of arrest and imprisonment in civil actions in the Courts of the United States, is regulated by the acts of Congress, of February 28, 1839, and January 14, 1841 (5 Stat. 321, 410), the latter being declaratory of the former. The first of these acts substantially provides that no person shall be imprisoned for debt on process issuing out of the Courts of the United States, in any State where by the laws of such State imprisonment for debt has been abolished, and that where imprisonment for debt was allowed upon conditions and restrictions, it should be allowed in like manner in the United States Courts. This act was not prospective, and therefore did not adopt the future legislation of the States. It was also held not to apply to actions in which the United States was plaintiff. On this latter account the act of January 14, 1841, was passed, which declared, that the act of February 28, 1839, should be construed to abolish imprisonment for debt in the United States Courts, in all cases where, by the laws of the State, imprisonment for debt has been or *shall hereafter be abolished.*

The act is prospective in its terms, so far as future laws of the State abolishing imprisonment for debt are concerned. Whether Congress has the power to adopt prospectively State legislation on any given subject, I do not propose to discuss. The power has been seriously questioned, and upon apparently good grounds. *In re Freeman*, (2 Cur. 491). But the act of 1841, is silent concerning the future laws of the States imposing restrictions and conditions upon the allowance of imprisonment for debt. It does not purport to adopt them. The law of this State regulating arrest in civil actions, requires as a condition precedent to an arrest, that the plaintiff shall give an undertaking to pay the defendant "all costs that may be adjudged to him and all damages which he may sustain by reason of the arrest, if the same be wrongful or without

sufficient cause, not exceeding the sum specified in the undertaking." (Or. Code, 165-6.) This is a condition or restriction imposed upon the allowance of an order of arrest, and is not adopted by the acts of Congress. The adoption of this law by a rule of Court, might make it of force *as* a rule of Court between private suitors, and even this is questionable. But the United States as plaintiff in an action, could not be bound by such a law unless enacted or adopted by Congress. This Court could not by rule require the United States to give security for costs, or damages. The United States never pays costs to the adverse party, and it would not be bound by any undertaking entered into on its behalf to pay any one, unless authorized by act of Congress.

The objection that the order was improperly allowed, raises the question, whether the United States is entitled to arrest a defendant in an action for a penalty, in this State. The Constitution of this State (Art. I, § 19), enacts: "There shall be no imprisonment for debt, except in case of fraud or absconding debtors." (Or. Code, 99).

The laws of this State provides, among other causes, that the defendant may be arrested on a civil "action for a fine or penalty." (Or. Code, 164.)

Counsel for the defendant maintains that this act of the Legislative Assembly, is in this particular repugnant to the Constitution of the State, and therefore void. No decision of the Supreme Court is cited in support of this position, and none is known to have been made.

The word *debt* is of very general use, and has many shades of meaning. Looking to the origin and progress of the change in public opinion, which finally led to the abolition of imprisonment for debt, it is reasonable to presume, that this provision in the State Constitution, was intended to prevent the useless and often cruel imprisonment of persons, who having *honestly* become indebted to another, are unable to pay as they undertook and promised. In this view of the matter the clause in question should be construed as if it read: "There shall be no imprisonment for debt *arising*

upon contract express or implied, except," etc. Such is substantially the language employed in the Legislative acts of most of the States, abolishing imprisonment for debt; and there can be but little doubt that this was the end which the framers of the Constitution had in view, as well as the popular understanding of the clause, when the instrument was adopted at the polls.

General or abstract declarations in Bills of Rights, are necessarily brief and comprehensive in their terms. When applied to the details of the varied affairs of life, they must be construed with reference to the causes which produced them and the end sought to be obtained. A person who willfully injures another in person, property, or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury a debt. But he is in fact a wrong doer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he is pecuniarily unable to pay what he promised to. For instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees ought not to be considered in the same category as an unfortunate debtor. He ought to be liable to arrest in action for damages by the party injured. Deny him this remedy, and in the majority of such cases it would amount to a denial of justice, and a deliberate repudiation and disregard of the injunction contained in section 10 of the same article—"every man shall have remedy by due course of law for injury done him in person, property or reputation." It may be admitted that a penalty given by statute is technically a debt. It does not, however, arise upon contract, but by operation of law. It is imposed as a quasi punishment for the violation of law or the neglect or refusal to perform some duty to the public or individuals enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are either in morals or law, wrong-doers, and not simply unfortunate debtors unable to perform their pecuniary obligations. I

The United States v. J. F. Walsh.

do not think the constitutional provision prohibiting imprisonment for debt was intended to apply to or include such cases. From these premises it follows of course that the act of the Assembly allowing the arrest of the defendant in an action for a penalty, is not in conflict with the Constitution, and therefore valid and binding.

But admitting, for the sake of the argument, that these penalties are a debt within the meaning of the clause prohibiting imprisonment for debt, do they not come within the exception—"except in case of fraud." The Internal Revenue Act required the defendant to affix a certain amount of stamps upon all the matches manufactured by him before selling the same or removing them for consumption or sale. As a means of enforcing or securing the payment of this tax, the act also imposed a penalty of fifty dollars upon the defendant for every omission to affix such stamp. The payment of this tax was a *duty* imposed upon the defendant by law. When he sold these sixteen packages of matches without affixing the stamps to them, he acted fraudulently. Thereby he cheated and defrauded the United States, the plaintiff in this action.

These penalties were incurred by this fraudulent act, and if they can be considered a debt within the meaning of said section 10, it is such a debt as falls exactly within the exception—being to all intents and purposes "*a case of fraud*," both in morals and law. Of course, in this respect there can be no distinction between cheating or defrauding the government of the United States and an individual.

The order for the arrest was properly allowed, and the motion of defendant must be denied.

A. C. Gibbs, for the plaintiff.

W. W. Page, for defendant.

James Field v. J. P. O. Lownsdale.

CIRCUIT COURT, SEPTEMBER 18, 1867.

JAMES FIELD v. J. P. O. LOWNSDALE, (*Administrator of the estate of Daniel A. Lownsdale, deceased,*) **AND THE SAID J. P. O., WILLIAM E. COOPER AND MARY E., HIS WIFE, MILLARD O. LOWNSDALE, RUTH A. LOWNSDALE, JOHN R. LAMB AND EMMA, HIS WIFE, AND IDA SQUIRES, (*heirs-at-law of the said Daniel H.,*) **AND THE SAID J. P. O.,** (*guardian of the said Millard O.,*) **WILLIAM E. COOPER**, (*guardian of the said Ida,*) **AND JOHN A. BLANCHARD**, (*guardian of the said Ruth A. Lownsdale,*) **AND WILLIAM POTTER AND ISABELLA ELLEN, HIS WIFE.****

Notwithstanding the order of a State Court allowing a petition for removal of a cause to an United States Circuit Court, the National Court must determine for itself the question of its jurisdiction, and if it appears that any of the defendants, are not entitled to such removal, the cause as to them must be remanded.

An application to a State Court for removal of a cause need not be made at the same time by all the defendants, though under the construction given to section 12 of the Judiciary Act (1 Stat. 79), all the defendants must have been entitled to such removal.

Certain defendants not served or appearing in the State Court when an order of removal was made, are not affected by it, and as to them the cause is still pending in that Court, and must be removed by its order upon the petition of such defendants, before they can come into the National Court.

The act of July 27, 1866 (14 Stat. 306), gives each defendant in a cause the right of removal without reference to the *status* of his codefendant, "if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants, as parties in the cause."

A suit to quiet title to real property against several defendants, who, as alleged in the bill, claim to be the owners of the same as tenants in common, "is one in which there can be a final determination of the controversy," as to each defendant, without the presence of the other, as a party in the cause, and therefore within the act of July 27, 1866, aforesaid.

DEADY, J. This suit was commenced in the Circuit Court of the State for the county of Multnomah, on April 8, 1867. On May 23, 1867, the Circuit Court of the State made an order transferring the cause to this Court. In pur-

James Field v. J. P. O. Lownsdale.

suance of this order, copies of the complaint, process and order were filed in this Court on August 30, 1867.

The order of removal recites, that it was made on the petition of the defendants, James P. O. Lownsdale, William E. Cooper, Mary E. Cooper, Millard O. Lownsdale, by his guardian, J. P. O. Lownsdale, Ruth A. Lownsdale, by her guardian John A. Blanchard, and Ida Squires, and that it appears from the petition that the plaintiff is a citizen of Oregon, and that Ida Squires is a citizen and resident of the State of Kentucky.

At the date of the order of removal, it does not appear that the other defendants, namely, Robert Lamb and Emma his wife, and William and Isabella Ellen Potter had been served with process or appeared in the suit. The order of removal is in terms unqualified, and removes the whole cause.

On September 9, 1867, the plaintiff filed a motion in this Court, praying that the cause be remanded to the State Court, for the reasons following:

1. It does not appear that this Court has jurisdiction by removal.
2. The defendants were not all in Court when the petition for removal was presented.
3. A part of the suit is yet pending in the said State Courts.
4. The grounds of removal are insufficient.

The order of removal made in the State Court is not conclusive upon the question of jurisdiction in the Federal Court. Notwithstanding this removal, this Court must determine for itself whether it can take jurisdiction of the cause. This proposition has, I believe, never been disputed, and it expressly affirmed in *Den ex dem. v. Babcock*, (4 Wash. C. C. 345); *Ward v. Arredondo*, (1 Paine, 414); *Illius v. The N. Y. and N. H. Railway Co.*, (3 Kernan, 598).

The first and fourth grounds of the motion to remand are general and may be passed over for the present.

The second ground is not maintainable. The application to remove need not be made at the same time by all of the

James Field v. J. P. O. Lownsdale.

defendants. If the defendants in Court were required to delay the motion for removal until all the defendants appeared or were brought into Court, the result might be that the time for making the motion would pass by, and the right to a removal be lost. (*Ward v. Arredondo*, 1 Paine, 415.)

The third ground of the motion assumes that the cause as to all of the defendants must be removed at once. But by the authority just referred to, it appears that the law has been held otherwise. Besides, as a matter of fact, the order of removal purports to transfer the whole cause to this Court. I suppose that counsel for the plaintiff mean to insist, as a matter of law, that the cause is still in the State Court as to the defendants—the Lambs and Potters. As to these defendants the cause is not in this Court. They are not included in the order of removal, and the fair presumption from the whole record is, that they were not before the State Court where the order was made. They cannot enter an original appearance in this Court, but only in the State Court. They can only come into this Court in pursuance of an order of the State Court where the suit was commenced.

But it may be that the State Court did not deem it necessary to a determination of this cause, that these absent defendants should be brought before it; and in this view of the matter, in making the order of removal, it may have regarded them as if they had not been named in the complaint. Or, it may have appeared to the Court that it was by the plaintiff's neglect or contrivance that these defendants were not brought before it, or that they, or some of them, were fictitious persons or dead, and that, therefore, the defendants in Court should not on that account be delayed in or denied their application for removal. I do not deem it necessary to decide this question absolutely, and only make these suggestions to prevent the contrary from being taken for granted if the question should arise in this Court hereafter.

As the law stood up to the passage of the act of July 27, 1866 (14 Stat. 306), the removal of a cause from the State Court to the National Court, was governed by section 12 of

James Field v. J. P. O. Lownsdale.

the Judiciary Act. (1 Stat. 79). The uniform—though not the most obvious—construction of that act has been that all the defendants must be entitled to have the cause removed. In other words, *all* the defendants, either as being aliens or citizens of another State, must be entitled to sue in the National Courts. (*Smith v. Rines et al.*, 2 Sum. 346–7; *Den ex dem. v. Babcock*, 4 Wash. C. C. 344; *Ward v. Arredondo*, 1 Paine, 411–12; *Wilson v. Blodget et al.*, 4 McLean, 363.) The only exceptions to this construction were the instances in which the defendants, who were residents and citizens of the State, were merely nominal or technical parties, without a beneficial interest in the controversy. (*Wormley v. Wormley*, 8 Whea. 451.)

Taking section 12 of the Judiciary Act, with its received construction as the rule regulating removals, and this motion to remand would have to be allowed. Of all the defendants who appeared at the State Court and joined in the petition for removal, only one of them—Ida Squires—appears to be a citizen of another State than Oregon. When the jurisdiction of this Court depends upon the character of the parties, it must appear affirmatively and cannot be presumed. For the purposes of this question of jurisdiction, the defendants before this Court, except Ida Squires, must be considered as not being entitled to sue in this Court, and therefore not entitled to remove a cause there from the State Court.

By the act of July 27, 1866 (14 Stat. 306), it is provided that when a suit is commenced “in a State Court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State,” * * * “and if the suit so far as relates to the alien defendant or to the defendant who is a citizen of a State other than that in which the suit is brought, is or has been instituted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then in every such case the alien defendant or the defendant who is a citizen of the

State other than that in which the suit is brought, may at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him, into the next Circuit Court of the United States to be held in the district where the suit is pending," * * * "and it shall be thereupon the duty of the State Court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal:" * * * "And such removal of the cause, as against the defendant petitioning therefor, into the United States Court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State Court as against the other defendants, if he shall desire to do so."

This act in a measure obviates the difficulty, not to say hardship, which arose from the early construction given to section 12 of the Judiciary Act. By the Constitution of the United States, and even the letter of that act, a certain class of defendants—aliens and citizens of other States—when sued in a State Court are entitled to have the cause removed into the proper National Court. Yet by this construction they were debarred of this right if they were joined with a codefendant who was not so entitled.

Still, as to all these defendants, except Ida Squires, this cause must be remanded to the State Court. As between them and the plaintiff, it is simply a controversy between citizens of the same State, who are supposed to have the same standing in the local forum, and with regard to whom the law presumes there exists neither prejudice nor favor on account of nationality or residence.

The judicial power of the United States, so far as it depends upon the character of the parties, does not extend to a controversy between citizens of the same State. And although there are many reasons why it should be held to extend to the *whole* of a controversy, where *some* only of the defendants are aliens or citizens of another State—as in this case—at present, it is sufficient to say, that Congress has not seen proper to provide for its exercise to that extent.

The only remaining question is, has this Court jurisdic-

James Field v. J. P. O. Lownsdale.

tion of this cause as to the defendant Ida Squires? To answer this question it is necessary to consider the nature of the suit and the relation of Ida Squires to the subject of it and the parties thereto.

From the complaint, it appears that the ancestor of Ida Squires conveyed block G, in the town of Portland, to W. W. Chapman, and that the plaintiff is in the possession and claims title by a regular chain of conveyances from Chapman to the north half of said block. The conveyance to Chapman is dated June 25, 1850. The complaint further alleges that the defendants, inclusive of Ida Squires, "are setting up some claim to the premises, tending to cast a cloud over the plaintiff's title," and therefore prays a decree against all the defendants, that they "be barred of setting up any claim or demand" to the premises in question. This is the subject of the suit—the title to the north half of block G, and the object of it is to quiet the title of the plaintiff thereto. If the defendants have any interest at law or in equity in the premises they must claim as the heirs of their ancestor, or the donees of the United States. In that case they must claim as tenants in common. If so, the interest of each in the land would be distinct from that of the other, and the suit might be separate as to each of them, either to quiet the title of the plaintiff or by the defendants for the purpose of recovering their supposed interest in the land. This being so, there can be no doubt but that the case falls exactly within the provision of the act of July 27, 1866—"the suit is one in which there can be a final determination of the controversy so far as it concerns Ida Squires, without the presence of the other defendants as parties in the cause."

An order will be entered remanding the cause as to all the defendants named in the order of removal except Ida Squires, and as to her the motion to remand is denied. This order is to be understood as in no way affecting the cause as to the defendants—the Lambs and Potters—who appear not to have been before the State Court, when the order of removal was made. If they, or either of them,

The United States *v.* Herman W. Davis.

should hereafter appear or be brought into the State Court, and that Court should deem it proper to order a removal of the cause, as to them, the question of jurisdiction, as to such defendants, can then be considered in this Court.

W. W. Chapman, for complainant.

W. W. Page and *W. Lair Hill*, for defendants.

CIRCUIT COURT, OCTOBER 1, 1867.

THE UNITED STATES *v.* HERMAN W. DAVIS, JAMES B. STEPHENS AND ROBERT PENTLAND.

In an action by the United States on a postmaster's bond, the defendant may plead a counter claim, if it appear from such plea that the items thereof have been duly presented to the proper department for allowance, and rejected.

The act of June 22, 1854 (10 Stat. 293, 299), authorizes the Postmaster General in his discretion to make an extra allowance to postmasters for extra labor and expense in certain cases: *Held*, that no postmaster has a right to such allowance until it is made him by the Postmaster General—and that the action of the latter in the premises is final, and not subject to judicial review.

A plea of counter claim for certain extra services and expenses incurred by a postmaster under the act aforesaid, or the one of July 1, 1864 (13 Stat. 335), should show that the office kept by the defendant was within the act authorizing an allowance on such accounts.

The provision of the act of July 1, 1864 (13 Stat. 335, § 5), which enacts, that "the Postmaster General, *shall* allow to the postmaster, a just and reasonable sum for the necessary cost *in whole or in part* of rent, fuel," etc., is in effect, permissive and not mandatory, and no postmaster has any legal right to such allowance until it is awarded him by the Postmaster General.

This action was brought by the United States against the defendant, Davis, and his sureties—Robert Pentland and James B. Stephens—in his official bond as deputy postmaster at the city of Portland, to recover certain moneys alleged to have been received and wrongfully detained by said Davis, while acting as such postmaster.

DEADY, J. The complaint alleges the making of the bond, and that between November 1, 1861, and November 4,

1865, Davis received as postmaster, the sum of \$9,032.40, and accounted for \$6,006.56 of the same, leaving a balance due the United States of \$3,025.84, for which it prays judgment against the defendants.

The answer of the defendants substantially admits the statement of the account as set forth in the complaint, and sets up a counter claim amounting in the aggregate to \$4,582.50. The first item in this counter claim is \$307, for postoffice stamps delivered to the successor of Davis. The rest of the items are for office rent, clerk hire, gas, fuel and stationery. The plaintiff demurs to the counter claim except the first item. This raises the question as to whether the defendant, Davis, was by law entitled to these allowances for these purposes. The answer avers that the items of the counter claim have been duly presented to the proper department for allowance and rejected. This being the case, if Davis was entitled as a matter of right to incur these expenses and pay them out of the proceeds of the office, he is entitled to have them allowed in this action, notwithstanding the decision of the department.

On the argument of the demurrer, the following acts of Congress have been cited by counsel for plaintiff, regulating the compensation and allowances of deputy postmasters, during the period Davis was in office. No other has been cited by counsel for the defendants, and I take it for granted, without further examination, that these are all that exist, touching this subject. (Act of June 22, 1854, 10 Stat. 293, 299; of March 3, 1863, § § 5 and 6, 10 Stat. 702; of July 1, 1864, 13 Stat. 335; and of March 3, 1865, § 3; 13 Stat. 505.)

The act of 1854, regulated the compensation and allowances of Davis, until the act of July 1, 1864, went into effect. This act gave deputy postmasters a certain commission "on the postage collected at their respective offices in each quarter of the year." This act also authorizes the Postmaster General to make certain allowances to postmasters at *distributing* and *separating* offices, for extra labor and necessary expenses incurred by them in the discharge of these

The United States v. Herman W. Davis.

special duties of distributing and separating the mails. But the statute is not imperative and gives the Postmaster General authority to make this allowance when in his judgment it is proper to do so. The statute commits the matter to the *discretion* of the Postmaster General, and the subordinate cannot claim the allowance as a matter of right. In this case it appears from the answer, that the Postmaster General has exercised his authority—his discretion—and refused to make the allowance. When the defendant, Davis, entered upon the office at Portland, he virtually agreed to perform the duties of the position for the commission allowed by law, and such further allowances for extra labor and expenses as the Postmaster General in his discretion might deem proper to allow him. It seems the Postmaster General has not seen proper to make him any allowance. So far as this statute is concerned, this is the end of the case. The extra allowance was to depend upon the award of the Postmaster General, and not of a Court or jury. The defendant never could have any *legal* right to an allowance, until it was given him by the judgment of his superior officer, and that officer having directly refused to make the allowance, I cannot see on what ground this counter claim can be sustained.

But this is not all. It does not appear from the answer that the office at Portland is or was, either a *distributing* or *separating* office. Even if the statute was absolute and gave these allowances as a matter of right, still the answer must show that the defendant was within its provisions—in other words that the office at Portland was a *distributing* or *separating* office. As a matter of fact, it is not pretended that the defendant's office was a *distributing* office, while I suppose it was a *separating* office. Now the allowance which the Postmaster General *may make* to a separating office, is a sum sufficient to compensate for "the *extra labor* necessary to a prompt and efficient performance of the duties of *separating* and *dispatching* the mails passing through his office." The allowance is for the extra labor in separating and handling the mail bags and dispatching them to the various

offices to which they are directed from the distributing office. Nothing is to be allowed by this act to a separating office for gas, fuel, stationery or office rent.

I find nothing in the act of March 3, 1863, which sustains the counter claim of the defendants. Section 5 requires the Postmaster General to make an allowance for *clerical* service, when "by reason of the presence of a military or naval force near any postoffice, unusual business accrues thereat." The answer does not bring the case of the defendants within this provision. Section 6 provides that "no postmaster shall hereafter, under any pretence whatever, have, or receive, or retain for himself, in the aggregate, more than the amount of his *salary*." Whether this provision applies to such postmasters, commonly called deputy postmasters, as received a *commission* upon postage, rather than a fixed salary, I am not prepared to say. But it matters not so far as this case is concerned.

By the act of July 1, 1864, the compensation of postmasters was changed. They were divided into five classes, and to receive salaries in proportion to the compensation received during the two prior years.

Sections 5 and 6 of this act relate to allowances for expenses. The first of these two sections provides, "That at the postoffice of New York, and at offices of the first and second classes, the Postmaster-General *shall* allow to the postmaster a just and reasonable sum for the necessary cost, *in whole or in part*, of rent, fuel, lights and clerks, to be adjusted upon a satisfactory exhibit of the facts. And at offices of the third, fourth, and fifth classes, such expenses shall be paid by the postmaster, except as in the sixth section provided." Section 6 authorizes the Postmaster-General to designate distributing and separating offices at the intersection of mail routes, "and where any such office is of the third, fourth or fifth class of postoffices, he may make a reasonable allowance to such postmaster for the necessary cost, in whole or in part, of clerical services arising from such duties."

To bring this case within either of these sections, I think

The United States v. Herman W. Davis.

the answer should contain averments, either that the office kept by Davis was of the first or second class, or had been designated as a distributing or separating office. The Court cannot presume that the office at Portland came within either of these categories—it must be averred.

But as this is a question of pleading rather than right, and may be avoided by amendment, if the facts will warrant, I will assume that the office at Portland, since July 1, 1864, was of the first or second class, or that it had been designated as a *separating* office. It is admitted, I believe, by counsel, that it was never a distributing office. The first assumption would bring the case within the provision of section 5. The language of this section is peculiar—the Postmaster-General *shall allow*, etc. It might be said, that even where the language of the statute was imperative, and absolutely required the Postmaster-General in a given case or contingency, to allow a postmaster certain expenses; yet, still, until the allowance was made, the postmaster would have no legal right to the sum expended, which he could assert in a Court in an action against him by the United States. Many reasons of public policy and convenience might be adduced in support of this construction of the statute. But notwithstanding these considerations, I think the contrary conclusion would be more consonant with justice and correct legal principles. When the statute peremptorily requires that the allowance be made, the officer makes the expenditure on the faith of the Government, pledged as it were by the words of the statute, and in such case, it seems to me the safer course to hold that such an expenditure constitutes a legal claim against the United States.

But this imperative language *shall allow*, is, I think, qualified by what follows—*in whole or in part*:—to require the Postmaster-General to allow an expenditure *in whole or in part*, is, in effect, equivalent to authorizing him to allow it or not in his discretion. The amendment to this section contained in section 3 of the act of March 3, 1863, uses the phrase, “authorized to allow, at his discretion.” Taken in

Susan Bennett v. Sanford J. Bennett.

connection with what appears to have been the uniform policy of Congress in regard to the extra allowances to postmasters, namely, to enable the Postmaster-General to *allow* but not to enable the postmaster to *demand* as a legal right, I am satisfied the language of section 5 ought to be construed as permissive and not mandatory to the Postmaster-General. As to section 6, the language is only permissive; "he *may make* a reasonable allowance."

Section 3 of the act of March 3, 1865, is amendatory of section 5 of the act of July 1, 1864. It enlarges the items of expenditure for which allowances may be made to postmasters, and includes offices of the third and fourth class as well as the first and third, but leaves it in the discretion of the Postmaster-General whether any allowance shall be made or not.

This disposes of the counter-claim of the defendant, so far as demurred to. The demurrer is sustained.

A. C. Gibbs, for plaintiff.

W. T. Trimble, for defendant.

DISTRICT COURT, OCTOBER 26, 1867.

[SUSAN BENNETT v. SANFORD J. BENNETT.]

In a suit for divorce, the statute of California (Hittel's Laws, § 2, 410), gives the Court power to make such order for "the *maintenance and education* of the children of the marriage, as may be just." *Held*, that as a proper means of exercising this power, the Court may award the custody of such children to either parent; and that although such award may appear unauthorized by such statute as construed in another forum, it cannot be questioned in such forum collaterally.

The domicile of the wife follows that of the husband during the existence of the marriage relation, but a divorce leaves the wife at liberty to choose her own domicile, and therefore where parties living in California were divorced, and the man removed to Oregon and acquired a domicile here while the woman remained in California, they became citizens of different States, and the latter may maintain an action against the former in the National Courts in Oregon, on account of such difference of citizenship.

Susan Bennett v. Sanford J. Bennett.

A decree of divorce, given in a Court of California, which provides that it may be modified upon the application of either party—sufficient cause being shown therefor—is not a temporary decree; and the presumption is that it remains unchanged, which presumption can only be overcome by record evidence to the contrary.

The National and State Courts not being foreign to one another, as the State Courts are, but subordinate parts of a complete system of government, with limited and separate jurisdictions, and the former having judicial knowledge of the laws of the several States, and, therefore of the mode of authenticating the judicial records thereof: *Semble*, that the act of May 26, 1790 (1 Stat. 122), prescribing the mode of proving the judicial records of a State when used in another State, does not apply to a case where such record is sought to be used in a National Court.

The certificate of a judge to the form of attestation of a clerk to a copy of the record of a State Court, did not show whether he was the *sole* judge, *chief* justice or *presiding magistrate* thereof, but it appeared from the laws of such State relating to the organization of such Court, that it consisted of a single judge: *Held*, that the authentication was sufficient under the act of May 26, 1789. (1 Stat. 122.)

The act of July 13, 1866 (14 Stat. 143), provides that a party having an interest in an instrument issued without being stamped, may have a stamp affixed thereto, by applying to "the collector of internal revenue of the *proper* district." *Quere*, is the *proper* district, the one where the instrument was issued, or where it is owned or sought to be used?

Where one person claims the legal right to have the custody of an infant child, and that right is denied and the custody of such child withheld by another, this constitutes a *controversy* within the purview of the Constitution of the United States (Art. III, § 2), and if the parties thereto be citizens of different States, it is a controversy within the judicial power of the United States to hear and determine by the proceeding known as the writ of habeas corpus.

Section 14 of the Judiciary Act (1 Stat. 81), which authorizes the Courts of the United States to issue writs of habeas corpus, is not restrained in its operation by the proviso thereto, except in the case of prisoners in jail under or by color of the authority of a State of the United States, in which case the writ can only issue to bring the prisoner into Court to testify.

According "to the usages and principles of law," mentioned in section 14 of the Judiciary Act, the power thereby given to the District Court to issue writs of habeas corpus, may be exercised by the judge thereof at Chambers.

On October 14, 1867, Susan Bennett exhibited her petition to the Judge of the District Court, praying for the allowance of a writ of *habeas corpus*, directed to Sanford J. Bennett, to obtain the custody of her infant child, Anna Bennett, alleged to be unlawfully detained from the petitioner by said Sanford J. Bennett. On the same day the

Susan Bennett v. Sanford J. Bennett.

writ was allowed and issued. On October 22, the respondent and petitioner appeared before the Judge, and the respondent then moved that the writ be dismissed for want of jurisdiction. After argument, by consent of parties, the decision of the motion was reserved until the final hearing. On October 24, the respondent made a return to the writ. To portions of the return the petitioner demurred, and after argument the demurrer was overruled. The petitioner then replied to the return, and the cause was tried and heard upon the questions of fact and law arising upon the evidence and pleadings, which are stated in the opinion of the Judge.

DEADY, J. From the proofs submitted by the parties, and the admissions in the pleadings, I have found certain conclusions of fact which it will be proper to state before considering the questions of law that arise thereon. They are these:

I. That in the month of August, 1862, at Oakland, in the State of California, the respondent and petitioner were lawfully married to one another, and that they continued to live together, in said State, as man and wife, until June 30, 1866, when the petitioner commenced a suit against the respondent in the District Court of the Seventh Judicial District, in and for the county of Sonoma, State of California, to obtain a dissolution of the bonds of matrimony then existing between the petitioner and respondent, and for the care and custody of the said infant child, Anna Bennett, the issue of said marriage.

II. That on July 10, 1866, the respondent, Sanford J. Bennett, was duly served with a summons to appear and answer the complaint of the petitioner in said suit, and that on July 17, 1866, he appeared in said suit and answered the complaint of the petitioner therein; and that afterwards, to wit: on September 26, 1867, and after due proceedings were had in the premises, to all of which the respondent appeared by his attorneys, the said District Court of the Seventh Judicial District, among other things, for and on account of extreme cruelty by the respondent to

Susan Bennett v. Sanford J. Bennett.

the petitioner, did adjudge and decree a dissolution of the marriage aforesaid, and that the petitioner being the most proper person therefor, have the care and custody of said infant child, Anna Bennett, the issue of said marriage; which decree and adjudication the said District Court of the Seventh Judicial District, had authority and jurisdiction then and there to pronounce and make, and the same still remains in full force and effect.

III. That the legality of the restraint herein complained of and in the petition herein alleged, has not been previously adjudged.

IV. That on or about July 26, 1866, the respondent removed from the State of California to the State of Oregon, taking with him the said infant child, Anna Bennett, and that he has remained in said State of Oregon ever since, and kept therein, in his custody and control, the said infant child.

V. That said respondent removed said infant child to the State of Oregon, as aforesaid, pending the litigation aforesaid, among other things for the custody of said infant child, for the purpose of placing it beyond the reach of the process of said District Court for the Seventh Judicial District, and thereby preventing the petitioner from having the care and custody of said child, if the same should be decreed to her by said Court.

VI. That at the date of the petition and the issuing of the writ of habeas corpus herein, the petitioner, Susan Bennett, was a citizen of the State of California, and the respondent, Sanford J. Bennett, was a citizen of the State of Oregon.

Upon the evidence, I deem these conclusions of fact to be established beyond a doubt, unless it be the one concerning the motive or purpose with which the respondent took the infant child and removed with it beyond the jurisdiction of the Court in California, pending the litigation there for the divorce and its custody. The fact of the removal is admitted. The motive with which it was done can only be inferentially known. Considered in connection with the circumstances under which it occurred, the most reasonable

Susan Bennett v. Sanford J. Bennett.

inference is, that it was done for the purpose of evading the power and authority of the Court, where the parties and child had their regular domicil.

The second and sixth of these conclusions of fact involve to some extent questions of law.

By the second of them it is found that the Court in California had authority and jurisdiction to make the decree it did, awarding the custody of the infant child to the mother.

In opposition to this conclusion, it was argued by counsel for the respondent, that the law of California did not authorize the Court to provide for the *custody* of the children of the marriage, in a suit for divorce, and that therefore its decree in this respect is void. The Act of California declares that, "In any action for a divorce, the Court may,
* * * at the final hearing, * * *
make such order for the * * * *maintenance and education* of the children of the marriage, as may be just." (Hittel's Laws, § 2,410.)

The argument for the respondent rests upon the proper construction to be given to the words *maintenance and education*.

Can it ever be necessary and proper in providing for the maintenance and education of the infant children of divorced parents, to provide for their custody? It seems to me that this question can admit of but one answer, and that in the affirmative. As a necessary and proper means to the maintenance and education of an infant child, the party charged with that duty ought to have the custody of it. Take this case for an illustration. If the Court had no power to change the custody of the child from the father to the mother, of what avail would be its order that the mother have the maintenance and education thereof. The child is a female, about five years of age, and whoever has the custody of it must or may control and direct its education. The one is implied in the other. The power being given to the Court pronouncing a decree of divorce, to make such order upon this subject *as to it may appear just*—to provide for the maintenance and education of the children of the

Susan Bennett v. Sanford J. Bennett.

marriage—it legitimately follows, that as a means to that end, the Court may properly control and dispose of the custody of such children.

Again, the Court is to make such order in the premises *as may be just*. The decree of divorce necessarily terminates the conjugal relation of the parties. The family is broken up. The children can no longer remain with both of the parents. One or the other, therefore, must be deprived of the society and services of its offspring. In such a case *justice* may require, that when the divorce is caused by the fault or misconduct of the father, other things being equal or even unequal, that the custody of the children be given to the innocent party—the mother.

But this is not all. The statute of California also declares that the Court “may at any time thereafter annul, vary or modify such order, as the *interest and welfare of the children* may require.” (Hittell’s Laws, § 2,419.)

It cannot be contended that the power to modify is more comprehensive than the power to make the original order. If the interest and welfare of the children is to influence the action of the Court in modifying the order for maintenance and education, it is but reasonable to conclude that the Legislature intended, that such interest and welfare should be considered and provided for in making the order in the first instance. To do this, especially in the case of infant children, the Court must have the power to place them in the proper custody—to give them to that parent most likely, under the circumstances, to promote their interest and welfare. In this case the California Court, sitting as a trier of the fact, found that the father was not a proper person to have the custody of this infant child and that the mother was. Under the circumstances, the Court was authorized to make such an order for the maintenance and education of this child as to it might appear *just*, as between the parties, and at the same time calculated to promote its interest and welfare. That the Court in the exercise of this power and for these ends, had authority to give the custody of the child to the mother, as a means of pro-

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Susan Bennett v. Sanford J. Bennett.

viding for its maintenance and education, in a way conducive to its interest and welfare, it seems to me there can be no doubt.

This question was argued by counsel for the respondent, upon the assumption that the judgment of the California Court was open to review here, and that if it appeared that such Court had misconstrued the statute from which it derived its authority, its action should be disregarded as null and void. But I am satisfied the law is otherwise. The Court had jurisdiction of the parties and the cause. The cause was the controversy between the parents concerning the divorce and the future maintenance and education of the children of the marriage. Admitting for the purpose of the argument, that the Court erred, either as to the fact or the law, in giving the custody of the child to the mother, as a means of providing for its maintenance and education, yet that error can only be corrected by appeal to the proper Court of review in California. But collaterally, the legality of this judgment cannot be questioned here or elsewhere. It is conclusive upon the parties to it, throughout the United States, until reversed or modified by the proper Court in the jurisdiction where it was given. (2 Am. lead. cas. 721.)

The sixth conclusion finds that at the date of the commencement of this proceeding, the respondent and petitioner were citizens of different States—the former of Oregon and the latter of California. There is no dispute as to the citizenship of the respondent, but as a matter of law, it is denied that the petitioner is a citizen of California. This denial rests upon the general rule of law that the domicil of the wife is controlled by that of the husband—that in law she is incapable of acquiring a domicil different from that of her husband. It is admitted that this is the general rule, but when the reason of the law ceases the law ceases with it. The domicil of a woman divorced from her husband is no longer that of the latter, but in the place of her own choosing. And this even appears to be the rule before a decree for divorce, where the wife is litigating for a judicial separation from the husband, on account of misconduct on

Susan Bennett v. Sanford J. Bennett.

his part, which entitles her to have the marriage dissolved. (Bishop on Mar. and Di. § 728; *Barber v. Barber*, 21 How. 582.)

In the case of *Barber v. Barber* (*supra*), the parties while domiciled in the State of New York were divorced simply from bed and board. The divorce was granted at the suit of the wife and the Court also decreed her alimony. To prevent the enforcement of this decree as to alimony, the husband left the State and acquired a domicil in the State of Wisconsin. The wife retained her residence in New York, and sued the husband in the United States Court for Wisconsin, to enforce the decree of alimony and prevailed there. The husband appealed the cause to the Supreme Court. Among other things, it was objected on the behalf of the husband that the National Court in Wisconsin had no jurisdiction, because the parties to the suit were not citizens of different States. The Supreme Court held, that even where a divorce was only from bed and board, that the control of the husband over the location of the wife ceased, and that her domicil thereafter must be deemed to be of her own choosing, and that therefore the Court had jurisdiction on account of the different citizenship of the parties, and affirmed the decision of the Court below.

In this case the parties were divorced absolutely and upon the authority of *Barber v. Barber*, as well as upon principle, thereafter, the domicil of the wife was according to the fact of *her* residence and not that of the husband.

The return of the respondent denied the existence of the alleged judgment in the Court of California, and on the hearing of cause, the petitioner to support the issue on her part, offered in evidence, what purported to be a transcript of the judgment roll of that Court. The respondent's counsel objected to the reading of the transcript, and it was admitted in evidence subject to the objections.

After careful consideration of the arguments and authorities, I have concluded that the objections to the admission of the transcript are not well taken.

The objections may be briefly stated as follows:

Susan Bennett v. Sanford J. Bennett.

I. The decree for the custody of the child, as set forth in the alleged transcript, is only temporary and not final.

II. The certificate of the Judge to the attestation of the Clerk is insufficient.

III. The certificate of the Judge is not legally stamped.

The first objection is easily disposed of. The decree provides in terms that it may be modified or changed hereafter, upon the application of either party, upon sufficient cause shown. But surely this is no reason why the decree should be treated as temporary, or why it is not absolute in the meantime. The decree in this respect only reserves to the Court the power to modify it hereafter; and the law gives that power to the Court whenever the interest or welfare of the child may require its exercise, independent of the reservation in the decree. Until changed, the decree is binding and absolute. The presumption is, that it remains unchanged, and that presumption can only be overcome by record evidence to the contrary.

This decree may also be appealed from within a year, as I read the laws of California, but until an appeal is taken, it must be deemed a final decree. The mere right of appeal does not qualify or impair the force or effect of a final decree in an inferior Court. The appeal must be actually taken, and that under such circumstances and with such security as would make it operate as a *supersedeas*. There is no presumption that an appeal has been taken, but the contrary.

The second objection admits of more controversy.

The act of May 26, 1790 (1 Stat. 122) prescribing the mode of proving the judicial records of a State, when used in another State, provided that in addition to the attestation of the clerk and the seal of the Court, there shall be "a certificate of the Judge, Chief Justice or presiding magistrate, as the case may be, that the said attestation is in due form." Counsel for the petitioner maintains that this act does not apply to the authentication of a State record in the national Courts, but only when used in the

Susan Bennett v. Sanford J. Bennett.

Courts of another State, and that, therefore, the certificate of the Judge is here unnecessary.

On several occasions when this subject has been before the inferior Courts of the United States, it seems to have been assumed that this mode of authenticating State records is necessary to make them evidence in the national Courts. (*Craig v. Brown*, Pet. C. C. 354; *Mewster v. Spalding*, 6 McLean, 25; *Tooker et al. v. Thompson et al.*, 3 McLean, 93.) But it seems very questionable if this interpretation of the act is the correct one. Of course Congress, by virtue of its general power to regulate the mode of proof and procedure in the national Courts, may prescribe in what manner and by what means a record of a State or other Court shall be proved therein. But was this act passed for such purpose, or was it intended to have any such effect? The act appears to have been passed in pursuance of Art. IV, § 1 of the Constitution. This clause of the Constitution has but one object in view—to declare that full faith and credit shall be given in each State to the judicial records, etc., of every other State; and then, as a practical means of making his abstract declaration effectual and useful, to authorize Congress to prescribe the manner in which such records should be proved or authenticated, *when used in another State*, and the effect thereof when proven.

Prior to the adoption of the constitution, under the rule of the common law, the judicial records of each State were treated as foreign judgments in every other State, and therefore only primary evidence of the facts and conclusions therein contained. In addition, each State might, for itself, prescribe in what manner such records should be proved, and might make that proof so difficult or uncertain, as to practically prevent their being used at all. Among a people about “*to form a more perfect Union*,” this was felt to be a serious evil, and consequently this provision was inserted in the Constitution, and the act of May 26, 1790, was passed to carry it into effect. As the State Courts do not take judicial knowledge of each other’s laws, and could not, therefore, know, without other proof,

Susan Bennett v. Sanford J. Bennett.

whether the certificate of the Clerk was in due form or not, Congress supplied the means of proof, by providing that *the Judge* of the Court should certify that the attestation of the clerk was in due form—that is, according to the law of the State where the record was made.

But the evil to be prevented by the constitutional provision never existed or could exist, so far as the national Courts are concerned. The National and State governments, although vested with distinct jurisdictions, are in no sense foreign to each other, but are subordinate and limited parts of one complete system of government. On principle, then, in the Courts of the United States, the judgment of a State Court ought to be regarded as a domestic judgment—a judgment given within the territorial sovereignty of the United States, and provable in the ordinary way, by the certificate of the custodian of the original—the clerk of the Court.

The national Courts take judicial knowledge of the laws of every State in the Union. (*Owings v. Hull*, 9 Pet. 624; *Woodworth v. Spaffords et al.*, 2 McLean, 175.)

This doctrine can only be maintained upon the theory that the States are a part of the General Government and territorially within the jurisdiction of the United States. This being so, the Courts of the United States do not require the certificate of the Judge of a State Court, that the attestation of the clerk thereof is in due form of law. They determine that matter by their knowledge of the laws of the State where it was made.

For these reasons, then, it appears to me that in this Court, a judicial record of the State of California, is admissible in evidence without the certificate of the Judge of the Court to the sufficiency or form of the attestation of the clerk. But as the cases which I have been able to find upon the subject, have been decided upon a contrary assumption, in deference to their authority, I proceed to examine the objection upon the theory, that such certificate is necessary.

It is admitted that the certificate of the Judge is sufficient, so far as it relates to the attestation of the clerk—that it is in due form of law.

Susan Bennett v. Sanford J. Bennett.

The objection is, that it does not appear from the certificate that the person who made it, is either the *sole* Judge, *Chief* Justice or *presiding* Magistrate of the Court that made the decree, or even that he is the Judge of that Court at all.

The language of the certificate, so far as it relates to the person who made it, is as follows:

“I, J. B. Southard, District Judge of the Seventh Judicial District of the State of California, do hereby certify,” etc. The official character of the Judge is repeated in the same words after his signature to the certificate.

From the transcript itself, and from the certificate of the clerk, it appears that the decree was made in the District Court of the Seventh Judicial District, in and for the county of Sonoma, State of California. It does not appear, then, from the certificate itself, that J. B. Southard was, at the date of making it, the *sole* Judge, *Chief* Justice or *presiding* Magistrate of the District Court, in and for *the county of Sonoma*. Whether the county of *Sonoma* is within the Seventh Judicial District, of which J. B. Southard certifies that he is District Judge, or whether the District Court for *Sonoma* is held by one or more Judges, does not appear from this certificate. Unless, then, the judicial knowledge of the Court, as to the laws of California, will supply these deficiencies in the certificate, the transcript cannot be read in evidence under the act of May 26, 1790.

The Constitution of the State of California (Art. VI, § 5), requires the legislature to divide the State into a certain number of judicial districts: “in each of which there shall be a *District Court*, and for each of which a *District Judge* shall be elected,” etc. (Hittell’s Laws, § 177.) In pursuance of this authority, the legislature of California created the “Seventh Judicial District,” including among others therein, the county of *Sonoma*. (Hittell’s Laws, § 1,337.) By section 1,358 of the same compilation, it appears, “There shall be held, in the Seventh Judicial District, terms of said Court, as follows: In the county of Sonoma,” on certain Mondays therein named. The words *said Court*, in the para-

Susan Bennett v. Sanford J. Bennett.

graph just quoted, refer to the words *District Court*, previously used in the same act.

Take these facts thus proved beyond controversy and add them to the statement in the certificate,—

“I, J. B. Southard, District Judge of the Seventh Judicial District of the State of California, do hereby certify,” etc., and the proof is complete. The District Judge of the Seventh Judicial District, is thus shown to be the Judge of the District Court in and for the county of *Sonoma*, and the sole Judge thereof, and therefore the person authorized to certify that the attestation of the clerk is in due form. •

The case of *Owings v. Hull* (9 Pet. 624–5), is a case exactly in point. The Circuit Court for the District of Maryland, on the trial of an action, admitted in evidence, a *copy* of a bill of sale executed in Louisiana, without proof to account for the non-production of the original. On error, the Supreme Court held, that the Court below was bound to take judicial notice of the laws of Louisiana. By those laws it appears that this contract being entered into before a notary, the original properly remained with that officer, and the party only took a copy. In this way the non-production of the original was decided to be sufficiently accounted for, without other proof.

The third objection is yet to be considered. It appears that the certificate of the Judge was made and issued without being stamped. It also appears that it was liable to a stamp duty of five cents. On October 21, 1867, before offering to use the certificate, the petitioner procured the Collector of Internal Revenue for this collection district to stamp the same and remit the penalty. This proceeding took place under section 158 of the Internal Revenue Act of June 30, 1864, as amended by the act of July 13, 1866. (14 Stat. 143.) This act authorizes the party issuing the instrument, or any person “having an interest therein, to appear before the collector of the revenue of the *proper* District,” and apply to have the same stamped. The objection is, that the proceeding did not take place

Susan Bennett v. Sanford J. Bennett.

before the collector of the *proper* District, and, therefore, the stamping is without effect.

For the respondent, it is maintained that there can be but one *proper* district, and that is the one in which the certificate was *made and issued*. On the other hand, counsel for the petitioner insist that at least where the party making the application is not the one who issued the instrument, the *proper* district is the one in which the instrument is proposed to be *used*. It would seem that the word *proper* is used in the act for the purpose of excluding the idea that the proceeding might take place before the collector of *any* district. But which is the proper district is a question easier asked than answered. I am not well satisfied in my own mind how the act ought to be construed in this respect. The objection may be well taken, but it is very technical. The petitioner is an innocent party, having an instrument and desirous of using it in this district. Under these circumstances she has had it stamped here, and I will consider it sufficient.

The only remaining question to be considered is that of jurisdiction.

By the Constitution (Art. III, § 2), the judicial power of the United States extends to *all controversies between citizens of different States*.

This is a *controversy*—a legal controversy—to be tried and determined by judicial proceedings and judgment. The controversy arises upon the alleged legal right of the petitioner to the custody of her infant child, and the denial and withholding of that right by the respondent. This is also a controversy *between citizens of different States*. The parties, although man and wife, have been divorced by the decree of a competent Court in a sister State. Since then, the citizenship of the wife depends upon the location of her domicil in fact, and does not follow that of the husband. The fiction of law, that the domicil of the wife follows that of the husband, is based upon the legal power of the husband over the person of the wife, as an incident of the marriage relation, and ceases with the reason of it—the exist-

Susan Bennett v. Sanford J. Bennett.

ence of the relation itself. It is clear upon principle, and upon the authority of *Barber v. Barber (supra)*, is not open to controversy.

But, although the judicial power of the United States extends to and includes a controversy of this kind, it does not necessarily follow that the *Courts* of the United States have jurisdiction and authority to try and determine it. The rule is long since established, that whatever may be the extent of the judicial power of the *Government* of the United States, its *Courts* can only exercise such jurisdiction as may be conferred upon them by Congress, excepting only the *original* jurisdiction of the Supreme Court, which is given and limited by the Constitution itself, and therefore beyond the power of Congress to enlarge or diminish.

The only authority of this Court, or the Judge thereof, to exercise jurisdiction or judicial power over this controversy, by means of the proceeding, suit or remedy known as habeas corpus, is derived from section 14 of the act of September 24, 1789 (1 Stat. 81) commonly called the Judiciary Act. It enacts:

“That all of the before mentioned Courts of the United States”—referring to the Supreme Court and District Courts—“shall have power to issue writs of habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the Justices of the Supreme Court, as well as the Judges of the District Courts, shall have power to grant writs of habeas corpus for the purpose of inquiry into the cause of commitment; *provided*, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify.”

This section consists of two distinct affirmative sentences or clauses, and a qualifying proviso.

Susan Bennett v. Sanford J. Bennett.

The first sentence confers the power upon the Courts generally to issue the writ of habeas corpus agreeable to the principles and usages of law.

The second sentence confers the power upon either of the justices of the Supreme Court and the Judges of the District Courts, to grant the writ for the purpose of inquiring into the cause of commitment.

The proviso limits the power of exercising jurisdiction by means of the writ in the case of prisoners in jail unless they are in custody by authority of the United States. The general scope of the proviso is also qualified by the last clause of it, which allows prisoners in jail to be brought up on habeas corpus to be used as witnesses, without regard to the authority under which they may be in custody.

In *Ex parte Bollman* (4 Cranch, 75), the Supreme Court decided, that the proviso extended to and qualified both the previous sentences of the section, and that therefore, in the case of a prisoner in jail—the case specified in the proviso—neither the Courts or the Judges of the United States, could grant the writ to inquire into the cause of commitment, except in the instances named in the proviso.

This construction of the section has ever since been maintained by the Supreme Court, *Ex parte Dorr* (3 How. 105.) The object and policy of it is apparent. It was intended to prevent conflicts between the judicial authorities of the national and local governments, and this was accomplished, by limiting the Courts of the former, in the exercise of their jurisdiction by means of habeas corpus, in the case of *prisoners in jail*, to such persons as were in custody by the authority of the United States.

As prisoners can only be *in jail* in the United States by *authority*, either of a State or the United States, this limitation upon the general power previously conferred in the section, amounts to no more than if the proviso had read thus: “*Provided*, That the writ of habeas corpus shall in no case extend to prisoners in jail under or by color of the authority of any State of the United States.”

Public authority—the authority to confine in jail, in this

Susan Bennett v. Sanford J. Bennett.

country, only exists in a State and the United States. It follows, then, that the legal effect of the proviso is the same, whether stated as in the statute or as I have just suggested. One expression is the exact equivalent of the other.

It is therefore apparent, that the power conferred by the first two sentences of this section, except as to the single instance of prisoners in jail by authority of a State, is not affected, qualified or diminished by the proviso. Its only office is to exclude from the operation of the general power already conferred, the cases of persons in jail by authority of a State, or, stated conversely, not in custody by authority of the United States.

In opposition to this construction of the section, counsel for the respondent maintained that the power to exercise jurisdiction by means of habeas corpus was confined to the cases enumerated in proviso—prisoners in custody by authority of the United States. But this construction rests the general power upon the proviso alone, and simply ignores all the rest of the section. The proviso was not added to the section to confer jurisdiction, but to limit that already granted in the previous part of it. The office of a proviso is to restrain, avoid or impose conditions upon that which precedes it. Without this proviso, upon the letter of the section, the writ might have extended to prisoners in jail under the authority of a State. To prevent this—to avoid the operation of the power conferred by the previous words of the section, in this respect, this proviso is added. What was before absolutely conferred, is now, in the case of prisoners in jail, given conditionally. They must be in custody by the authority of the United States, or the writ shall not extend to them. But this condition in the proviso only extends to the cases of prisoners in jail. In all other cases the general authority conferred by the first two sentences of the section remains unimpaired and unqualified.

The case of *Ex parte Dorr* (3 How. 105), is cited and relied upon by counsel for respondent as supporting his construction of the section. In June, 1844, Dorr was convicted and sentenced to imprisonment for life, by the judgment of

Susan Bennett v. Sanford J. Bennett.

the State Court of Rhode Island, for the crime of treason against the State. Access to Dorr being denied, the case came before the Supreme Court, on application on his behalf, for a habeas corpus to bring him before the Supreme Court, to enable him to sue out a writ of error to the State Court. The Court refused the application on the ground that Dorr was in prison under the sentence of a State Court. The motion does not appear to have been argued, and the Court treated it as a matter too plain for argument.

But in the course of its brief opinion, in commenting upon section 14, the Court says: "The power given to the Courts in this section, * * * as regards the writ of habeas corpus *is restricted by the proviso to cases where a prisoner* 'is in custody under or by color of the authority of the United States.' * * * The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable."

The case before the Court, and which alone it decided, was the case of a *prisoner* confined by authority of a State, and the language of the opinion, unless the contrary is manifest, must be confined to the case then under consideration. The question whether the power to issue the writ was restricted to the cases enumerated in the proviso, was not before the Court or in the case. Besides the Court impliedly qualifies its general statement as to the restrictive effect of the proviso, by limiting it to the case of "*a prisoner*"—the only case before it. Read with reference to the subject under consideration, this paragraph in the opinion of the Court only states, "that in *case of a prisoner*, the proviso restricts the general power given by the section, to persons in custody under the authority of the United States."

But this is not all. In the next clause in the opinion, the Court states the rule, conversely, thus:—"Neither this or any other Court of the United States, or Judge thereof, can issue a habeas corpus to bring up *a prisoner, who is in custody under a sentence of execution of a State Court*, for any other purpose than to be used as a witness."

Susan Bennett v. Sanford J. Bennett.

This shows beyond question, the point the Court was considering and what it intended to decide. If there is room for a difference of opinion as to what was intended by the first statement of the Court, the second one is explicitly against the color now attempted to be given to it. And even, if upon the whole, the *language* of the Court would authorize the conclusion attempted to be drawn from it by counsel, I should hesitate to adopt it. The construction is manifestly erroneous, not to say more—the point was not in the case nor before the Court, and I should feel warranted in treating it as an inadvertence of expression readily perceived and easily corrected by an examination of the subject and the context.

The District Courts of the United States have power to exercise jurisdiction by means of habeas corpus in all controversies to which the judicial power of the United States extends. As has been shown, that power extends to this controversy, on account of the citizenship of the parties. The power is given by this section; and it is not restricted by the words, “which may be necessary to the exercise of their respective jurisdictions.” These words apply only to the last antecedent phrase—“and all other writs not specially provided by statute.” In the case of *Ex parte Bollman* (*supra*), the Supreme Court examined this question at length and decided expressly that this grant of power—to issue writs of habeas corpus—could not be taken “in the limited sense of being merely used to enable the Court to exercise its jurisdiction in causes which it is enabled to decide finally.”

Again the Court says, in the same case, “From this review of the extent of the power of awarding writs of habeas corpus, if the section be construed in the restricted sense, from a comparison of the nature of the writ which the Courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the Legislature.”

Susan Bennett v. Sanford J. Bennett.

Of course the reasoning and conclusion of the Court in *Ex parte Bollman* applies to the District Courts as well as the Supreme Court. No distinction between them is made by the Court, and none could be made, for as the Court says in the same case, "the power is granted to all" (the Courts of the United States) "in the same sentence and by the same words."

Conkling's commentary on the case is to the same effect, and he adds, "The propriety of the latter construction"—against the limited sense—"was demonstrated by a masterly *reductio ad absurdum*." (Conk. Treat. 77.)

It may be said that a power given to a Court to issue writs of habeas corpus, cannot be exercised by the Judge thereof. Certain writs of habeas corpus only issue from a Court, because they are not used except in aid of the jurisdiction of the Court in cause before it. But this is the writ *ad subjiciendum*, and according to the rule prescribed in this section 14—"the usages and principles of law"—may be issued by a Judge. Where a Court is constituted with more than one Judge, it might well be from the nature of its organization, that a grant of power to such a Court, to issue writs of habeas corpus *ad subjiciendum*, could not be exercised by a single Judge thereof. Perhaps, for that reason, the second sentence in the section was inserted, giving the Justices of the Supreme Court power to issue the writ in case of commitment. It is true the Judges of the District Court are included in this provision, but this may have been deemed expedient, out of abundance of caution, to prevent an inference that the power was intended to be denied them. (Conk. Treat. 79.)

This question was not made on the argument. But it has occurred to me during the consideration of the case, and being a question relating to jurisdiction, I do not think it proper to pass it over in silence. After careful deliberation, I have concluded that the power conferred upon the District Court to issue the writ *ad subjiciendum*, may be exercised by the Judge thereof. This is "agreeable to the principles and usages of law," regulating the issuing of this writ, as I understand them.

Susan Bennett v. Sanford J. Bennett.

If the power conferred upon a Judge by the second sentence of this section, to issue the writ to inquire "into the cause of commitment," applies to this case, of course this question would be an immaterial one. But I am not satisfied that the word *commitment*, as there used, was intended or can be construed to apply to a case of restraint imposed by a private person. The technical sense of the word—and I am not aware that it has any other signification—is a restraint or confinement by *public* authority.

On the argument of this cause, the case of *Barry v. Mercein*, decided by Judge Betts in the Circuit Court for the Southern District of New York, was relied on by counsel for respondent. The report of the case is not here, but numerous citations from the opinion of the Judge, are to be found in the argument of counsel when the same case was before the Supreme Court on error. (5 How. 103.)

The case was this: Barry, an alien, was married in New York to Mercein, a citizen of New York. Afterwards the parties separated and Barry returned to Liverpool, Nova Scotia. An infant child of the marriage remained in the custody of her mother and her father. Barry applied to the Supreme Court of the United States for a habeas corpus to obtain the custody of the child. The Court refused the writ, because of its want of *original* jurisdiction. In denying the motion, Story, Justice, seemed to assume that the inferior Courts of the United States could exercise the jurisdiction. True, this is not asserted in so many words, but certainly nothing is said or suggested to the contrary. The Court says: "Without, therefore, entering into the merits of the present application, we are compelled, by our duty, to dismiss the petition, leaving the petitioner to seek redress in such other *tribunal of the United States* as may be entitled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of the Judge of this Court, assigned to that circuit and district" (of New York), "creates no legal obstruction to the pursuit thereof." (*Ex parte Barry*, 2 How. 65.)

In pursuance of this suggestion of the Supreme Court,

Susan Bennett v. Sanford J. Bennett.

Barry applied to the Circuit Court of the United States for the District of New York. No Justice of the Supreme Court was present, and the application was heard by Judge Betts. He denied the writ on several grounds, the most important of which were want of jurisdiction, and that it appeared that the father was not entitled to the custody of the child. The second ground was a sufficient reason for denying the writ, even if the Court had jurisdiction.

But, on the question of jurisdiction, the case is not in point. The Court was asked to take jurisdiction on account of the difference in citizenship of the parties, and could not take it on any other ground—that the petitioner was an alien and the respondent a citizen of the State of New York. The parties had not been divorced, and the marriage relation was subsisting between them in full force. The rule of law being that the domicile of the wife follows that of the husband, the allegation of the different citizenship of the parties could not be sustained. But in this case the different citizenship of the parties is a fact established beyond dispute.

Since the cause was submitted, I have found a case exactly in point. (*United States v. Green*, 3 Mass. 482.) Aaron Putnam, a citizen of New York, had a habeas corpus directed to Timothy Green to obtain the custody of his infant child. The case was in the Circuit Court for the District of Rhode Island. The respondent was the maternal grandfather of the child, and it had been left with him by the mother on her death-bed. The case was finally compromised, but Mr. Justice Story issued the writ and compelled a return to it. The question of jurisdiction was not directly raised, but it could not have escaped the attention of Court and counsel. The inference is, that the Court considered that it was not open to controversy.

Apart from the mere legal question concerning jurisdiction, this is a case, which, upon the merits, this Court ought to take cognizance of and give the petitioner the relief prayed for. The respondent found the petitioner in California and married her there. Married her, too, upon a public profes-

Susan Bennett v. Sanford J. Bennett.

sion that he had united with the church of her faith—a profession which his answer in the California Court substantially admits was a mere pretense to obtain her consent to the marriage. Afterwards, when a controversy arose between the parties, involving the custody of the infant child of this marriage, and while that controversy was being litigated in the Court of their domicil, respondent, to defraud the petitioner of the probable results of that litigation, left the State and carried the child to Oregon, and compelled the petitioner to follow him here to enforce her rights against him.

If it was thought proper and right by the framers of the Constitution and Congress to give the national Courts jurisdiction of a controversy between citizens of different States, where the matter in dispute is mere rights of property—to be measured by mere dollars and cents—why should their jurisdiction not extend to the more important controversy like this, where the matter in dispute is the custody and control of an infant child of the parties.

The objection, that the control of the domestic relations belongs properly to the State Courts, and that therefore the United States Courts ought not to take cognizance of questions concerning them, is merely begging the question.

The domestic forum in California has determined who is best fitted and entitled to have the custody of this child. The matter has been *adjudged*, and this proceeding, rendered necessary by the improper conduct of the respondent, in abducting the child, is only for the purpose of enforcing that adjudication against the respondent. The purpose of this proceeding is not to appoint a guardian, but to enforce a right in the petitioner already established by the judgment of a competent Court. If, in the course of the litigation, any question arises, involving the domestic relations, it must be determined for the purpose of this adjudication, as it would be in any other action, suit or proceeding.

If A, a citizen of California, sues B, a citizen of Oregon, in the United States Circuit Court for this district, to recover possession of real property in this State, as he doubt-

David Dick v. Christina E. Hamilton.

less may, in the progress of the proceeding, it may be necessary to determine questions of marriage, legitimacy, guardianship, or any other question involving what is called the domestic relations of the parties or those under whom they claim. But no lawyer would pretend for a moment, that the Court ought not to take jurisdiction of the action on that account.

The premises considered, it is adjudged that the petitioner is entitled to the custody of the infant child, according to the force and effect of the decree of the Court of the Seventh Judicial District of California for the county of Sonoma, and the marshal is ordered to deliver it to her to keep accordingly.

Lansing Stout, for the petitioner.

J. H. Mitchel and *William R. Willis*, for respondent.

CIRCUIT COURT, DECEMBER 2, 1867.

DAVID DICK, (*surviving partner of James Vantine*) v. CHRISTINA E. HAMILTON, ALEXANDER HAMILTON AND THOMAS HAMILTON.

In equity, the general rule is that the separate answer of one defendant is not evidence to support the complainant's cause as against a co-defendant; and the exceptions to this rule appear to be limited to cases where the defendants stand in such relation to one another as to render their admissions out of Court evidence against each other.

Where the wife purchased real property with money received from the sale of her property, but which had become the husband's by virtue of the marriage, and took a conveyance to herself: *Held*, that although this was in effect a voluntary conveyance from the husband to the wife, it was valid, if the husband was solvent at the time, and it was not made with intent to defraud subsequent creditors.

It is not to be presumed that a creditor of the husband's, trusted him upon the faith of property, which, although occupied by him in conjunction with his wife, appeared from the registry of deeds to have been at the time the property of the wife.

David Dick v. Christina E. Hamilton.

A subsequent creditor has no claim on the property of the wife for money expended thereon, unless it appear that it was so expended with intent to defraud such creditor.

A conveyance of real property to the wife by a third person in consideration of a release of a right of dower by the former in certain other property, is a conveyance upon a consideration moving from the wife, and valid as against the existing or subsequent creditors of the husband.

Where an insolvent husband lived with his family in the house of his wife, and during the time made repairs thereon, so as to keep it habitable: *Held*, that the property was not liable to the creditors of the husband for the value of such repairs.

At common law a married woman is incapable of contracting a personal obligation, and therefore a conveyance of real property to one in consideration of her promissory note for the purchase money, is in effect a gift to her.

Where real property is conveyed to the wife, to hold the same free from the control of her husband and for her own separate use, it becomes, by force of the terms of the conveyance, her separate property, and the husband as such has no right in or to it.

A conveyance to the wife, the husband being insolvent, in consideration of a promissory note signed by the husband and wife and secured by a mortgage on the separate property of the latter, ought, unless the contrary is shown, to be presumed to have been made upon the faith of such security.

This was a suit by a creditor of Alexander Hamilton and Thomas, his son, to subject certain real property situate in the city of Portland, and held by the wife of said Alexander to the payment of his debts upon the ground that it had been acquired with his means and credit, and the conveyance taken to the wife with intent to defraud creditors. The defendant, Christina Hamilton, answered the bill, but said Alexander and Thomas did not, and as against them the bill was taken for confessed.

The Court found the material facts of the case to be as follows:

I. That the defendants, Alexander Hamilton and Christina Hamilton, were intermarried in the year 1853, at Portland, Oregon, and that the relation of husband and wife has ever since subsisted between them.

II. That prior to the marriage of the defendants as aforesaid, Christina Hamilton inherited from her mother, a piece or parcel of real property situated in the State of Missouri, and that in July, 1857, she sold and conveyed the

David Dick v. Christina E. Hamilton.

same to her brother, Asa Chandler, for the sum of one thousand dollars; and that she received from her said brother at the said time, the additional sum of two hundred dollars, in payment for the prior use and occupation, by said Chandler, of said real property.

III. That on February 13, 1858, in consideration of the sum of five hundred dollars, paid by Christina Hamilton, to Daniel H. Lownsdale, the latter conveyed to the former, the real property described in the complaint as block 250, to have and to hold the same to her and the heirs of herself by the defendant, Alexander Hamilton, forever.

IV. That the defendant, Christina Hamilton, since her marriage aforesaid, has not received from any source or person, other than her husband, any money or property, except the sum of \$1,200 as aforesaid.

V. That during the spring of 1858, Alexander Hamilton purchased the real property described in the pleadings as blocks 251 and 252, and lots 3, 4, 5, and 6, in block 253, and that of the money expended in making such purchase he obtained \$700 of his wife—the same being a part of the \$1,200 paid her by her brother; and that during the summer of the same year, Alexander Hamilton had these blocks cleared, and a dwelling house built upon the lots in block 253, at a cost of about \$1,900.

VI. That in the spring of 1858, Alexander Hamilton was solvent, and so continued until the spring of 1859, when from causes not foreseen or contemplated by him, he became insolvent and still remains so.†

VII. That on January 14, 1862, blocks 251 and 252, and lots 3, 4, 5 and 6 aforesaid, were sold on execution to satisfy a decree of the Circuit Court of Multnomah county, foreclosing a mortgage thereon, executed by Alexander Hamilton to one William A. Abbott; and that said Abbott was the purchaser at such sale, and afterwards conveyed said property to Thomas Robertson.

VIII. That Christina Hamilton was not a party to the mortgage aforesaid, and, notwithstanding the sale and foreclosure aforesaid, had a contingent right to dower in the

David Dick v. Christina E. Hamilton.

property conveyed to Robertson as aforesaid; and that afterwards, on August 9, 1864, in consideration of the release of such right of dower, in said blocks 251 and 252, by Christina Hamilton to Robertson, the latter and wife conveyed to the former, and to her heirs of her body by her then husband, lot 4 aforesaid, to have and to hold to her said heirs aforesaid, to her and their own separate use, benefit and behoof forever, free from all control of her husband.

IX. That on the day of August aforesaid, Robertson and wife, for the consideration of \$700 paid by Moses H. Young, conveyed to said Young lots 3, 5 and 6 aforesaid; and this purchase and conveyance was made and received by said Young at the request of Christina Hamilton and upon the agreement between said Christina and Young, that the latter would sell and convey to the former said lots for a like consideration—to which effect said Young executed his bond to said Christina.

X. That on September 5, 1865, said Young and wife, in consideration of the promissory note of Christina Hamilton for the sum of \$700, conveyed said lots 3, 5 and 6, to said Christina and her heirs of her body by her then husband, to have and to hold to her said heirs aforesaid, to her and their own separate use, benefit and behoof forever, free from all control of her husband.

XI. That the dwelling house aforesaid, is located in the greater part upon lot 4 of said lots, and has been occupied since its erection continuously by the defendant, Alexander Hamilton and his family, as a dwelling place.

XII. That the property aforesaid was a part of the donation claim of Nancy Lownsdale, deceased, the wife of Daniel H. Lownsdale aforesaid, and that in a suit by certain of the heirs of said Nancy, against Christina and Alexander Hamilton and others, for partition of said claim, the Circuit Court for the county of Multnomah, on August 12, 1865, among other things, adjudged and decreed that said heirs, for and on account of the inequality in quantity and value of the partition then made of the lands of their ances-

David Dick v. Christina E. Hamilton.

tress, should have and hold a lien upon block 250 for the sum of \$1,423.91, and \$103.37, costs and expenses of the suit, and upon lots 3, 4, 5 and 6 aforesaid, for the sum of \$911.96.

XIII. That on September 16, 1865, Christina Hamilton borrowed \$700 to pay the note aforesaid, given by her to Moses Young, and that with the money so borrowed she paid \$550 on said note to Young, and that the remainder thereof is still unpaid; and that the \$700 aforesaid was borrowed of James Catlin upon a promissory note signed by said Christina and Alexander Hamilton, and secured by a mortgage executed by each of them upon lots 3, 4, 5 and 6 in block 250 aforesaid, which note and mortgage still remain unpaid and in force.

XIV. That on February 16, 1866, Christina Hamilton borrowed of Frances Young, wife of Moses Young aforesaid, a sum sufficient to satisfy and discharge the lien aforesaid upon block 250, in favor of the heirs of the said Nancy Lownsdale; and that said sum was borrowed upon a promissory note, signed by said Christina and Alexander Hamilton, and secured by a mortgage executed by each of them upon block 250 aforesaid; and that said note and mortgage still remain unpaid and in force, except as to the sum of \$109, which has been paid by Christina Hamilton; and that with the money so borrowed, said lien was then satisfied and discharged; and that the lien aforesaid, in favor of the heirs aforesaid, upon the said lots 3, 4, 5 and 6, still remains wholly unsatisfied and in force.

XV. That during the years 1858, 1859, 1860 and 1862, Alexander Hamilton expended in improvement upon block 250 the sum of \$600, about \$400 of which sum was expended prior to and during the spring of 1859; and that during the summer and fall of 1864, and after the conveyance thereof to Christina Hamilton, said Alexander expended upon lots 3, 4, 5 and 6 the sum of \$277, as follows: \$247 upon the dwelling-house aforesaid, situate thereon, and in fencing the same, \$30.

XVI. That since the commencement of this suit, J. M.

David Dick v. Christina E. Hamilton.

Starr, in pursuance of a judgment of this Court, given in an action therefor against Alexander Hamilton, has recovered the possession of block 250 aforesaid, for the life of the said Alexander Hamilton.

XVII. That the complainant and James Vantine, on and before January 9, 1867, were doing business in San Francisco, California, under the firm name of James Vantine & Co.; and that said firm on said day of January recovered judgment in this Court against the defendants, Alexander and Thomas Hamilton, for the sum of \$2,306.44, and \$63.52 costs and disbursements; and that on February 2, 1867, execution issued out of this Court to enforce said judgment, which execution was duly returned wholly unsatisfied; and that said judgment was given as aforesaid, in an action upon an account for goods, wares and merchandise purchased of said James Vantine & Co. by said Alexander and Thomas Hamilton, between September 4, 1863, and May 27, 1864; and that before the commencement of this suit said James Vantine was deceased, and the complainant, David Dick, was thereafter and now is the sole surviving partner of the firm aforesaid.

DEADY, J. The defendants, Alexander and Thomas Hamilton, have not answered, and as against them the complaint is taken for confessed. Counsel for the complainant maintained that the default of these defendants, and the consequent admission by them of the facts stated in the complaint, is to be taken as evidence against their co-defendant, Christina Hamilton.

But, in my judgment, the rule of law is otherwise; and consequently, in arriving at the foregoing conclusions of fact, as between the complainant and Christina Hamilton, I have disregarded the default of these defendants.

The admission of these defendants, arising from their failure to answer, cannot in any view of the question have a more favorable effect for the complainant than if such defendants had answered and affirmatively admitted the truth of the complaint. The general rule seems well established,

David Dick v. Christina E. Hamilton.

that the separate answer of one defendant is not evidence to sustain the complainant's case against a co-defendant. The exceptions to this rule are not uniformly defined in the authorities. But the current of them appears to limit the exceptions to cases where defendants stand in such a relation to each other that the admission of each, if not under oath, would be evidence against the others, as in the case of several defendants standing in the relation of copartners, or as having a joint interest in the subject matter of litigation. (*Christie v. Bishop et al.*, 4 Barb. Ch. 105; *Leeds v. Marine Insurance Co.*, 2 Whea. 380; *Chapman v. Coleman*, 11 Pick. 331, 1 Green. Ev. § 178.) It seems, also, that the exceptions include the case where one defendant succeeds to the rights of another, or claims through another, pending the litigation. (*Osborn v. Bank of the United States*, 9 Whea. 738; C. Bowen and Hill's notes, 648, 650.)

This case does not come within any of these exceptions. Even admitting then (which is not clear) that the silence of these defendants is equivalent, as to their co-defendant, to an answer affirmatively admitting the truth of the facts stated in the complaint, still such admission is not evidence against Christina Hamilton.

The complainant alleges in his complaint that the various conveyances by which Christina Hamilton was invested with the legal title to block 250 and lots 3, 4, 5 and 6 in block 253, were in fact procured by the husband and upon his money and credit, for the purpose of defrauding his creditors. The answer of Christina Hamilton denies these allegations of the complaint.

The legal effect of the transactions in question and the *intent* with which they were procured and done must be controlled and determined by the law arising upon the facts found.

The \$1,200 which the wife received from the sale and use of her land in Missouri, by operation of law, became the property of the husband, as soon as she received it. The provision in the State Constitution (Art. XV, § 5) concerning the property of married women, does not apply, as the

David Dick v. Christina E. Hamilton.

Constitution did not go into force until February 14, 1859, nearly two years after the receipt of the money by the wife. This being the case, the purchase by the wife of block 250 with \$500 of that money, was in contemplation of law a purchase by the husband for her benefit. The circumstances under which this money was obtained by the husband may disclose an adequate and proper motive for the conveyance to the wife, but they fail to show that the consideration in point of law moved from her. It is a post nuptial settlement—the consideration moving from the husband and the conveyance being made to the wife, and, as to the creditors of the former, is to be considered as a voluntary conveyance from the husband to the wife. (*Sexton v. Wheaton, et ux*, 8 Whea. 241.) As between the latter, there are no circumstances shown upon which the law would imply that the wife took the legal estate in trust for the husband. Upon the facts proved, the conveyance must be considered as an absolute gift from the latter to the former. The husband being free from debt at the date of the conveyance, it must be sustained, unless made with intent to defraud subsequent creditors, like the complainant. (2 Kent's Com. 173; *Reade v. Livingston*, 3 John. Ch. 481.)

The statute of frauds of this State in favor of creditors (Or. Code, 656), is substantially a copy of the statute 13, Eliz. chap. 5. The English and American decisions made upon this statute, all hold that a voluntary conveyance to a wife or child by a husband or father, not indebted at the time, 'is valid as against subsequent creditors, unless it affirmatively appears that it was made with intent to defraud and deceive them.

There is nothing in the facts of this case to warrant the conclusion that this conveyance was made with intent to deceive and defraud subsequent creditors, unless it be that the grantor subsequently became insolvent. In some of the English cases it has been held that subsequent insolvency of the grantor is sufficient to warrant the conclusion that the conveyance was made with a view to such insolvency, and therefore with intent to defraud and deceive. But in

David Dick v. Christina E. Hamilton.

these cases the insolvency occurred soon after the execution of the deed—it appeared to have been contemplated by the grantor at the time, and it is to be supposed, as was the custom then in England, that the conveyance was secret—not put upon record—and that therefore the subsequent creditors acting upon the unchanged and visible possession of the grantor, were misled and deceived into crediting him upon false appearances.

In this case it is shown that the grantor did not contemplate insolvency at the time of the conveyance to the wife, and that he did not even contemplate engaging in the mercantile partnership which caused his insolvency for nearly a year afterwards. A fair and reasonable motive is shown for the conveyance—the investment by the husband of a part of the money which he had received from his wife, for her benefit.

In addition, the conveyance was put upon record within six days after its execution. This is an important fact, and in my judgment sufficient in itself to show that the same was not made to defraud and deceive subsequent creditors. In *Sexton v. Wheaton* (*supra*, 251) the Supreme Court, in contrasting the circumstances of that case with those of *Stephens v. Olive* (2 Bro. Ch. R. 90), say—“The reasons why they” (these circumstances) “should not be considered in this case as indicating fraud, were stronger than in England. In this District” (of Columbia), “every deed must be recorded in a place prescribed by law. All titles of land are placed upon the record. The person who trusts another upon the faith of his real property, knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit. In this case, the title never was in Jos. Wheaton. His creditors, therefore, never had a right to trust him on the faith of this house and lot.”

So in the case under consideration. The title to block 250 was never in the husband, and prior to the conveyance of it to the wife, the husband was never in the possession or control of it. Since February 19, 1858, the records of the

David Dick v. Christina E. Hamilton.

county have shown that the title was in the wife. Under these circumstances it would be preposterous to presume that Vantine & Co. trusted the husband in 1863-4 upon the faith of this property, and there is as little reason for concluding that the husband procured the conveyance to be made and put upon record with the intent to defraud or deceive his subsequent creditors. If the husband had gone into the possession of the property, and kept the conveyance to his wife a secret, there might be good reason, in the absence of explanatory circumstances, for regarding the transaction as a fraudulent contrivance, intended to give him a fictitious credit with the world. But as it is, the means employed were inadequate to such an end, and it ought not to be presumed that they were intended to accomplish it.

In *Sexton v. Wheaton*, already quoted, the Court, in speaking of a voluntary conveyance, says: "A man who makes such a conveyance, necessarily impairs his credit and, *if openly done*, warns those with whom he deals not to trust him too far; *but this is not fraud.*"

That case and this are very similar in all their important particulars. In some respects the objections to the validity of the conveyance were stronger than in this case. The Court decided that the conveyance to the wife was not fraudulent as to subsequent creditors. The opinion of the Court was delivered by Marshall, Ch. J., and in the course of it, he examines and construes all the leading English cases on the subject. It will be found to sustain the validity of this conveyance upon every point on which it is questioned.

The complainant also seeks to charge this block 250, with the value of the improvements made upon it by the husband. The amount expended by the husband upon the property is \$600. Two thirds of this sum was expended before the husband became insolvent, and all of it before he became indebted to Vantine & Co.

Whatever might be right of a creditor, who was such at the time the improvements were made, subsequent creditors can have no claim on the property on that account, unless

David Dick v. Christina E. Hamilton.

it appears that this money was thus bestowed upon the wife, with intent to defraud and deceive such creditors. For the reasons already given when considering the validity of the conveyance of this property, there can be no presumption that this money was bestowed upon the wife with any such intention or end in view. It was done openly. The money was expended for improvements upon property, the title to which was on record as that of the wife's. There is as little reason for supposing or presuming that Vantine & Co. trusted the husband upon the faith of these improvements on block 250, as that they trusted him upon the faith of the property itself.

At the date of the conveyance of block 250 to the wife, the effect of marriage upon the property of the wife was regulated and prescribed by the rules of the common law. The conveyance by its terms does not exclude the property from the marital rights of the husband. The husband then took an estate for his life in the premises.*

The improvements placed upon the property were only temporary in their character, and primarily calculated to promote the use and enjoyment of the premises by the tenant for life. The ownership and possession of this life estate of the husband's, together with the use and enjoyment of these improvements, have, by virtue of a judgment of this Court, already passed to a prior creditor of the husband's. The only interest of the wife in block 250, is the estate in remainder, after the determination of the particular estate for the life of the husband. In my judgment, this estate of the wife's, ought not, nor cannot, be charged with the value of these temporary improvements, even in favor of creditors whose debts existed at the time they were made. But, however this may be, their value, as an incident of the husband's life estate in the land, has already been appropriated to the payment of his debts, and is therefore beyond the reach of the present creditor. This disposes of the case of complainant, so far as block 250 is concerned, except as to the

**Starr v. Hamilton et al.*, ante, 268.

David Dick v. Christina E. Hamilton.

interest therein, purchased from the Lownsdale heirs, which will hereafter be considered.

As to the lots in block 253, the circumstances of the case are different. At the date of the conveyance of these to the wife, the husband was actually and notoriously insolvent, and Vantine & Co. were among his existing creditors. Although, notwithstanding these circumstances, these conveyances may be valid, yet they are sufficient to excite suspicions of fraudulent contrivances, which will induce a Court to scrutinize the motives and conduct of the parties closely and with more or less distrust.

The purchase and conveyance of lot 4 will be first considered.

This was not a conveyance from the husband to the wife, either directly or by procurement of the former. It was a purchase in point of fact by the wife. At common law a wife could purchase an estate in fee, even without her husband's consent (2 Kent's Com. 150), and her power in this respect is not qualified by any statute of this State. The consideration for the conveyance moved directly from the wife, and the purchase in no way diminished the husband's resources or hindered or delayed his creditors in the recovery of their debts. The consideration was the release by the wife of her contingent interest—potential right to dower—in blocks 251 and 252, before then sold on execution against the husband. True, the husband joined in the instrument releasing this interest in these blocks, but that was rendered necessary by our statute.

I have examined this question with care, and am now satisfied, that the expressions upon this subject in the opinion in *Starr v. Hamilton et al.* (*ante*, 268), decided in this Court are erroneous. For the purpose of that case, the conclusion then reached—that the husband had no interest in the property—was correct; but the remark that the property was a gift from the husband, because the release of dower was a consideration moving from him, was undoubtedly a mistake. On the contrary, I am now satisfied that it must be held to be a valuable consideration moving

David Dick v. Christina E. Hamilton.

directly from the wife. It was sufficient in law to support a conveyance of property equivalent in value, directly from the husband to the wife, even against existing creditors of the former. For still stronger reasons it is sufficient consideration to support a conveyance to the wife from a stranger. (*Bullard v. Briggs*, 7 Pick. 533; *Pierce v. Thompson*, 17 Pick. 394; *Needham v. Sauger*, Id. 509; Cord's Mar. Wom. § 31, *et seq.*; 3 Kent's Com. 147.)

According to the facts found this release of dower was the only consideration for the conveyance, and the evidence in the case does not furnish a particle of proof to the contrary. This right was in no way subject to the control of the husband, or liable for his debts.

Bullard v. Briggs (*supra*), was a case of conveyance by the husband to the wife, in consideration of the latter's release of right to dower. The conveyance was attempted to be impeached by existing creditors. The Court sustained the conveyance, and in conclusion said—"We are quite satisfied with this principle of law, and are glad to find that it rests on authority as well as reason; for under the restrictions mentioned, creditors cannot be injured; the husband's estate, to which they may look, not having been impaired substantially by such arrangements. Whenever it shall appear, that such settlements are but pretexts to secure a beneficial property to the husband, or wife or children, the law will lay bare the transaction and defeat the contrivance, however ingeniously it may have been devised."

But this transaction, being a conveyance from a stranger to the wife for a valuable consideration, moving from the wife, in which the husband had no interest or right, there can be no possible ground for presuming or suspecting that it was a mere pretext or contrivance to secure a beneficial property to the husband or any one else, to the prejudice or hindrance of his creditors. In truth, as has been already remarked, the purchase in no way diminished the husband's estate or hindered or delayed his creditors in the recovery of their debts, and therefore it could not have

David Dick v. Christina E. Hamilton.

been made with any such intention. The husband had no interest in the property conveyed or the consideration given for it, and his creditors might as well seek to subject the dower of the wife to the payment of his debts as lot 4. Indeed, a gift of this lot from the grantors—Robertson and wife—to Christina Hamilton, might as well be considered a contrivance to defraud the creditors of Alexander Hamilton, as the conveyance in question. •

The expenditure made by the husband in repairing the dwelling house on this lot, and in fencing it in conjunction with 3, 5 and 6, will now be considered.

The complainant maintains that this expenditure was in fact a gift to the wife by the husband, with intent to defraud existing creditors. The matter transpired in 1864, and as the husband was then insolvent and indebted to Vantine & Co., the law presumes that a gift to the wife is fraudulent as against such creditors.

An insolvent husband ought not to be allowed to put his property beyond the reach of his creditors, by investing it in improvements upon his wife's estate. But it is the duty of the husband to maintain his family. When an insolvent husband lives with his family on the property of the wife, it seems just and reasonable that he should be allowed, notwithstanding his creditors, to keep the same habitable and in repair. Within reasonable limits, this ought to be regarded as a necessary and proper means of performing his obligations to support his wife and family. (15 B. Monroe, 82.)

I admit that there is both temptation and opportunity here to practice fraud upon creditors, and that whenever it appears, or there is reasonable ground for presuming that expenditures have been made by the husband upon the wife's estate, beyond what is absolutely necessary and proper for the shelter and maintenance of the family, that the expenditure ought to be considered a gift to the wife in fraud of the rights of creditors. What will amount to such a gift and what will not, is difficult to determine beforehand. Each case must rest upon its peculiar circumstances. Under the

David Dick v. Christina E. Hamilton.

most rigid rule, I do not think that this expenditure can be regarded in the light of a gift to the wife. Between the time of the purchase of this property by the wife and the commencement of this suit, more than two years had elapsed, during which time the husband and family lived in the house. The husband had no other house to shelter his family in. If he had rented one, however humble, the expense would have exceeded in amount this expenditure. Yet he could have paid such rent from his earnings or from any means within his control, and when paid, the money would have been beyond the reach of his creditors.

During these two years the house was plastered at a cost of \$220. Two hundred dollars of this amount was a stale debt due the husband from a third person, and \$20 was paid in cash by the wife. This, I suppose, was her personal earnings—the testimony says that it was paid by her—but, of course, in law, it was the money of the husband. Twenty-seven dollars was expended in raising the house and putting blocks under it. The house was built by the husband in 1858, when the property was his, and appears to have been in an unfinished condition. These repairs and additions seem to have been necessary to make it tenantable and preserve it from decay. Thirty dollars was expended for material for fencing, and the fence was built by the husband. A creditor cannot compel his debtor to labor, although in certain cases he may reach the wages of the latter; but when no wages are earned—as where the labor is given gratuitously—the debtor acquires nothing and cannot be said to dispose of his *property* with intent to defraud his creditors. Though an insolvent husband cannot give property to his wife, he may give her his personal services, and her estate will not be made chargeable to his creditors. (11 Ala. R. 386.)

Under all the circumstances, I am satisfied that this expenditure should not be regarded as a gift to the wife, but as a legitimate expense incurred by the husband in pursuance of his duty and obligation to support his wife and family.

David Dick v. Christina E. Hamilton.

In considering the matter of these expenditures, I have not included the item for painting the house. The testimony does not state what the painting cost, but that it was done by the tenant of a small house on the premises for rent. As will appear hereafter, this being the *separate* property of the wife, the proceeds of it—the rents and profits—are also her *separate* estate. The payment for this work, then, whatever it amounted to, was made by the wife from her separate property, and not by the husband in fraud of his creditors.

The purchase of lots 4, 5 and 6 in block 253, will next be considered.

The apparent motive for this transaction will be best shown by a brief statement of the particular circumstances which appear to have induced it.

These lots and lot 4, formed the half of block 253, originally purchased by the husband in 1858, in conjunction with blocks 251 and 252, in part, with the \$700 derived from the property of the wife. On January 14, 1862, all the property was sold on execution, to Abbott, to satisfy a debt of the husband's. The dwelling house on the half of block 253, had been erected by the husband before his failure, and occupied by the family as a home. The family were still on the premises, when the property, less the contingent interest of the wife, her inchoate right to dower, was sold on execution to Abbott. In August, 1864, the family still being on the premises, and Abbott having conveyed to Robertson, the wife and the latter commenced negotiations for her release of dower on blocks 251 and 252. Robertson offered to convey lot 4 for the desired release. The dwelling house or outbuildings being partly on some of the lots other than 4, and the whole constituting as it were the family home, the wife conceived the idea of purchasing lots 3, 5 and 6 also. Being then unable to pay for them, she arranged with Young to purchase these lots for her as stated in the finding of the facts. This arrangement being accomplished, the wife accepted Robertson's offer—released her right to dower in blocks 251 and 252—and received a conveyance to her own use of lot 4. At the same time Robertson conveyed lots 3,

David Dick v. Christina E. Hamilton.

5 and 6 to Young for the consideration received from the latter of \$700.

The conveyance by Young and wife to Christina Hamilton of lots 3, 5 and 6 on September 5, 1865, to the exclusive use of the latter, was neither in form or law a conveyance from the husband, and therefore cannot be considered as made with intent to defraud or deceive his creditors. The husband had no interest in the property, nor did the consideration for the conveyance move from him directly or indirectly. The consideration was the promissory note of the wife. So far as this consideration is concerned, the conveyance amounts to a gift, from Young to the wife, because the wife in law is incapable of binding herself personally, and therefore this promissory note was invalid and without value. Her disability during coverture prevails in this State as at common law. In the *El Refugio* case, recently decided in the U. S. Circuit Court for the District of California, before Mr. Justice Field, this subject was examined at length. The conclusion of the Court in that case was that: "Except in certain special cases, to which we will presently refer, a married woman is incapable of contracting a personal obligation. Her disability arising from her coverture, prevails in all its force in this State, as at common law. By no form of acknowledgment or mode of execution can this disability be overcome. Her signature will not impart validity to the contract; nor will her uniting in its execution with her husband render it more than his personal obligation."

But \$550 of the note was paid to Young on September 16, 1865. The facts show that this was done by means of money borrowed on the joint note of Hamilton and wife, secured by their joint mortgage on the half of block 250. Of course this note to Catlin, so far as the wife is concerned, is a nullity. The note is nothing more than the personal obligation of the husband.

The husband being insolvent at the time, the transaction must be scrutinized closely, so as to prevent him from successfully using his wife as an agent to purchase property with his means or credit, to hold in fraud of his creditors.

David Dick v. Christina E. Hamilton.

Credit, which is the life of a commercial community can only be maintained by rigidly subjecting the property of the debtor to the payment of his debts.

It cannot be supposed that Young intended to make a gift of this property to the wife, and although he took an invalid promise as a consideration for the conveyance, it must be presumed that it was the intention and expectation of the parties that it should be paid notwithstanding.

The payment of \$550 to Young, leaving out of sight the mortgage for the present, was made with money borrowed on the note of the husband. This must be treated as the money of the husband, and if so, the consideration of the conveyance from Young to the wife, moved from the husband. This being so, in contemplation of law, the conveyance was a voluntary one from the husband to the wife, and therefore void as against the complainant, an existing creditor.

But this is not all. The purchase money obtained from Catlin was not borrowed on the personal obligation of the husband alone. The note was secured by a mortgage on the property of the husband and wife in the half of block 250.

The wife, in conjunction with her husband, was authorized to execute the mortgage to secure the payment of the note, considered as the note of the husband alone. As the husband was then insolvent, and still remains so, the presumption is that the money was in fact obtained on the security of the mortgage. And, as it appears that the note is not yet paid, it may be safely assumed that the property will be ultimately subjected to sale for its payment.

Now, if it shall result that the wife's property in the half of block 250 shall be subjected to the payment of the note to Catlin, then the purchase money paid to Young would move from her. This being so, the conveyance would not be in fraud of her husband's creditors, and would be valid.

At the date of the mortgage the husband had only a life estate in block 250, and it appears that this has since been taken on execution and sold to satisfy other debts of his.

David Dick v. Christina E. Hamilton.

If the lien of the judgment on which the sale took place is older than the mortgage to Catlin, the latter would only affect the estate in remainder of the wife, and then it would be certain that her property must be taken to satisfy the note. But which is the elder does not appear. But it does appear that there are judgments against the husband, given before 1861, and still unsatisfied, to the amount of \$6,525, besides the accruing interest thereon. There is no direct proof of the present value of this life estate of the husband's, but from all the circumstances shown, concerning the location, condition, and first cost of the block, it is apparent that it is not near sufficient to pay the husband's debts, which are now a lien upon it, and were so prior to the execution of this mortgage. Upon this matter, of course, I speak as to probabilities, as the proof does not enable me to speak with certainty.

Under these circumstances, to assume that the consideration for the conveyance of lots 3, 5 and 6, came from the husband, and that therefore the conveyance is fraudulent as against creditors, might work great injustice to the wife, for the strong probability is that the note to Catlin will be paid out of her estate in block 250. Indeed it does not appear whether that estate is sufficient for that purpose, but it probably is. But if it should prove insufficient for that purpose, the wife is not personally liable, and the property which she pledged by the mortgage being exhausted, the remainder of the debt would hold good against the husband and upon his personal obligation. And then, in that event and to that extent, he must be deemed to have furnished the consideration of the conveyance to the wife from Young—that is, so much of the money would prove to have been borrowed upon his personal credit and obligation, and therefore a proportional interest in the property purchased would be subject to the claims of existing creditors.

If, as a matter of fact, it was apparent upon the proof, that the purchase of lots 3, 5 and 6, and the loan of the purchase money from Calin, were the act of the husband, and that the wife only acted in the premises as his security,

David Dick v. Christina E. Hamilton.

it might be proper to treat her accordingly, and decree the sale of these lots at once, and after paying the wife \$700 with interest, for which her property is pledged, to apply the remainder of the proceeds to the debt of the complainant.

But the proof shows, whatever may have been the motives of the parties, that the purchase in the first instance was made by the wife, and that the subsequent loan of the purchase money was in fact obtained by her, and that the husband joined in the note and mortgage thereof, because his concurrence in the act was deemed necessary by the party making the loan. True, these facts do not modify the legal effect of the transaction. In law, the note and mortgage is the act of the husband, while by the mortgage the wife only pledges her property as a security for the debt of the other.

But I think these facts furnish substantial and controlling reasons why a court of equity should so deal with the subject, as to provide if possible that the wife may realize the benefit of her scheme to secure to herself the home of the family, and also to give her the benefit of the increase in value, if any, of the property, since the time of its purchase. If the sale of her estate in block 250 will do this, it may be so applied without injustice to any one, and much probable benefit to her. At least she should have the option.

Besides it is evident that the wife had the same right to dower in these lots as in blocks 251 and 252. This right was not released to Robertson in the purchase of lot 4, and in the arrangement between the parties, which resulted in Young's purchasing these lots for her from the former, the value of this contingent interest of the wife's must have been taken into consideration. It is fair to presume that it was a part of the consideration. If these lots were now sold for the benefit of the husband's creditors, the sale would be subject to such right of dower, with which the wife has never parted.

The payment of \$1,500 in discharge of the lien upon block 250, must be considered as a purchase of the interest

David Dick v. Christina E. Hamilton.

of the heirs of Nancy Lownsdale in the premises. The proceedings and decree in the partition suit are very cursorily stated in the complaint, but taking the allegations on that subject in connection with the law relating to the partition of real property, and it is apparent that these heirs were tenants in common with Christina Hamilton in block 250, and that the decree was based upon the fact that their interest in the premises was deemed to be worth \$1,500, and that the property should be charged with the payment to that sum, instead of being divided in proportion of the respective interests of the tenants. What proportion the interests of the heirs bore to that of Christina Hamilton does not appear, and there is nothing in the pleadings or the proofs in this case by which that fact can be ascertained.

This interest of these heirs in block 250 was purchased by money borrowed of Francis Young on February 16, 1866. The money was borrowed on the joint note and mortgage of the husband and wife. The property mortgaged was block 250. This transaction is regarded in law in the same light as the prior loan from Catlin. So far as the personal obligation is concerned, it is the debt of the husband—the signature of the wife to the note being a nullity. The husband was insolvent at the time. The debt was contracted for the benefit of the property of the wife, and that property was pledged and remains pledged for the payment of the debt.

As the matter stands, it is altogether probable that the property of the wife will be taken to pay the debt. Whether it will be sufficient or not, for that purpose, does not appear. But the personal obligation of the husband was also given for the debt and he is liable to pay it, and may be compelled to do so, in whole or in part. In that event and to that extent, the purchase money for this interest would move from him, and the interest thus purchased would be subject to the claims of his creditors.

But it cannot be absolutely assumed that the purchase money was obtained on the credit of the husband, or that he will ultimately repay it; and without this it would work

David Dick v. Christina E. Hamilton.

injustice to the wife to treat this interest as purchased by the husband and subject it to sale for the benefit of his creditors—for, if the property of the wife in block 250 is ultimately subjected to the payment of the loan from Francis Young, as it probably will be, then the consideration for the purchase of the interest of the Lownsdale heirs, would come from her, and such interest would be hers, and not the husband's.

Lot 4, and whatever interest the wife may be determined to have in lots 3, 5 and 6 in block 253, are the separate estate of the wife. Although this property—being in fact purchased by the wife—was not “acquired by gift, devise, or inheritance,” and therefore not within the clause of the Constitution (Art. XV, § 5), which exempts such property from “the debts or contracts of the husband,” yet the nature of the conveyances from Robertson and Young to her, make it her separate property. These conveyances studiously declare, that the grant is made to her for her own benefit, exclusive of the control of her husband. These words effectually exclude the marital rights of the husband or the claims of his creditors. (Cord's Mar. Wom. § 156; 2 Story's Eq. §§ 1880-1-2.)

It does not appear that this property was ever registered by the wife in pursuance of the act of June 4, 1859, in force when she acquired it. But that act by its terms only applies to property “acquired by gift, devise or inheritance.” (Or. Code, 786.)

As the case now stands, it satisfactorily appears that the interest in block 250 conveyed to the wife by Daniel H. Lownsdale, subject to the life estate of her husband, and lot 4 in block 253, are the absolute property of the wife, and not subject to the claims of the husband's creditors. But as to the interest in block 250, purchased from the Lownsdale heirs, and lots 3, 5 and 6 in block 253, no final decree can be safely made upon the present state of the proofs.

An interlocutory decree will be therefore entered, referring the case to a master, with authority to take testimony

In re Robert A. Sutherland.

and report to the Court the present cash value of the wife's interest in block 250, derived from Daniel H. Lownsdale, and also the present value of the interest in said block, purchased from the Lownsdale heirs; and further, to ascertain the amount due upon the note and mortgage to Catlin, and also to Francis Young, and that the Clerk of this Court be appointed special master to execute this order.

On January 9, 1868, upon the report of the special master, there was a final decree dismissing the bill.

J. H. Page & W. W. Reed, for complainant.

W. Lair Hill, for defendant, Christina Hamilton.

DISTRICT COURT, JANUARY 11, 1868.

In re ROBERT A. SUTHERLAND.

No. 61 of the forms of proceeding in bankruptcy, is merely a demand for a jury trial, and not an answer to the petition—it is neither a showing of cause nor an allegation by the respondent, and the denial contained in it, is to be taken as the mere recital by the clerk of a denial already and otherwise made by the respondent in his answer to the petition.

Whether the answer or plea of the respondent to the petition should be general or specific or verified or not, must depend upon the rules of the Court in which the petition is pending.

The general rule of this Court being that answers must be specific and verified, and the true object of pleading in any case being to narrow the controversy to the point really in dispute, no greater latitude ought to be allowed the defence in bankruptcy in this respect, than in ordinary actions and suits.

Where a petition alleged that the respondent, with knowledge of his insolvency, confessed two judgments in favor of third persons with intent to give a *fraudulent* preference to such persons, and the answer of the respondent tacitly admits the confession of said judgments and insolvency, but denies that the same were confessed “with any *fraudulent* intent or with the *fraudulent* intent to give a *fraudulent* preference:” Held, that the issue taken by the answer upon the word *fraudulent* in the petition was an immaterial one, and that a confession of judgment by an insolvent debtor necessarily gave a preference to the creditor in such judgment and ought therefore, in the absence of sufficient allegation or proof to the contrary, to be presumed to have been so intended.

In re Robert A. Sutherland.

Where the respondent by his answer admits, that being insolvent, he confessed a judgment in favor of one of his creditors, but denies that he thereby *fraudulently* intended to give such creditor a *fraudulent* preference, there is an *affirmative implication* that such judgment was confessed with intent to give a preference, and the petition is entitled to judgment on the pleadings. In effect, the Bankrupt Act (§ 39) prohibits an insolvent debtor from giving *any* preference for *any* reason to *any* creditor, upon pain of being declared a bankrupt therefor, on the petition of his other creditors.

On November 30, 1867, certain creditors of Robert Sutherland filed a petition in bankruptcy against him, charging him with the commission of divers acts of bankruptcy, alleged to have been committed on and after November 19, 1867, and praying that said Sutherland be declared a bankrupt. On the filing of the petition an order was entered, requiring the respondent to show cause on the first Monday in January, proximo, why the prayer of the petition should not be allowed.

On January 1, 1868, the respondent filed a paper in the words of "Form No. 61" of the prescribed "forms of proceeding in bankruptcy," signed by himself and solicitor, but not by the clerk, and also a special answer to the petition verified by his own oath.

At the time appointed for showing cause, the parties appeared, and the petitioners moved for judgment on the pleadings, and the respondent for an order setting down the cause for trial by jury, as demanded in the paper filed by him.

DEADY, J. The petitioners' motion for judgment, assumes that form No. 61, entitled—"Denial of bankruptcy and demand for jury by debtor"—is simply a rule entered by the clerk, at the instance of the debtor, for a jury trial; and that the statement therein, that the respondent "appears and denies that he has committed the acts of bankruptcy set forth in said petition, and avers that he should not be declared a bankrupt for any cause in said petition alleged," is a mere recital, which is based upon, and presupposes, that the debtor has shown cause why he should not be adjudged a bankrupt, by filing an answer or plea to the allegations of the petition.

In re Robert A. Sutherland.

Sections 40, 41, of the Bankrupt Act, provide that upon the filing of the petition, "the Court shall direct the entry of an order requiring the debtor to appear and show cause, * * * why the prayer of the petition should not be granted," and that, upon the day appointed to show cause, "the Court shall proceed summarily to hear the *allegations* of petitioner and debtor, * * * and shall, if the debtor on the same day so demand in writing, order a trial by jury, at the first term of the Court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy."

An *allegation* is the statement by a party of his cause of action or defence. To *show cause*—is to make appear, to give a reason.

From the well understood signification of these terms, and the nature of the proceeding, I infer, that the act intends, that on the day appointed to show cause, the respondent shall appear and plead to the petition—that is, answer it in writing. *In re Drummond*, (1 Bank Reg., 10), it appears that the respondent "filed a plea denying the charges" in the petition.

As at present advised, I must decide that the paper filed in the words of form No. 61, is merely a demand for a trial by jury, and not an answer to the petition. It is neither a showing of cause nor an allegation by the respondent, and the statement contained in it concerning the denial by the respondent of the acts of bankruptcy alleged in the petition, must be construed as a recital by the clerk, of a denial already and otherwise made by the respondent;—and this recital is made for the purpose of showing on the face of the entry, that it is authorized by what has preceded it—the filing of an answer to the petition controverting the allegations therein contained.

Whether this answer ought to be general or specific, or verified or not, must depend, as it appears to me, upon the general rules of the Court wherein the petition is pending, in regard to pleadings, or any special rule which may be made therein concerning pleadings in bankruptcy. The

In re Robert A. Sutherland.

general rule of this Court requires that answers or pleadings by the defendant, shall be both specific and verified. No good reason is perceived or suggested, why any greater latitude in pleading should be allowed the defence in a petition in bankruptcy, than in ordinary actions and suits.

In either case, the true object of pleading is the same—to narrow the controversy to the point really in dispute between the parties. To allow the respondent to controvert the allegations of the petition by the entry of a rule or order with the Clerk, or a general unverified answer, would often, if not always, impose upon the petitioner the unnecessary and burdensome trouble and expense of proving that which the respondent well knew to be true, and which he would not deny under oath.

In considering the motion for judgment, the denial recited in the demand for a jury trial, will be laid out of view as immaterial, and the only question is whether the answer admits sufficient to authorize the Court to give judgment, pronouncing the respondent a bankrupt.

Among other things, the petition alleges that the respondent, on November 19, 1867, then and prior thereto, well knowing that he was insolvent, confessed two judgments in favor of third persons, with intent to give a *fraudulent* preference to such persons over his other creditors.

The answer tacitly admits the confession of the judgments and the insolvency of the respondent, but denies that such judgments were confessed “with any *fraudulent* intent, or with the *fraudulent* intent to give a *fraudulent* preference” to the creditors therein.

This traverse, as to the intent with which the judgments were confessed, is too broad. Although the petition alleges that the intent was to give a *fraudulent* preference, the allegation is surplussage, and not traversable. The Bankrupt Act (§39) does not use the word *fraudulent* in this connection. It declares that an insolvent debtor who confesses a judgment “with intent to give a preference to one or more of his creditors, shall be deemed to have committed an act of bankruptcy.”

In re Robert A. Sutherland.

The manifest object of the Act is to secure an equal distribution of the property of an insolvent debtor among his creditors; and to this end it is made an act of bankruptcy for such debtor to prefer one creditor over another, without reference to the question whether such preference would otherwise be considered *fraudulent* or not.

The petition in this case, and the answer following it, seem to have been drawn upon the theory that a confession of judgment by an insolvent is not an act of bankruptcy unless it was done, not only with an intent to prefer the creditor in such judgment, but also with a special intent to defraud the other creditors. Now, section 39 of the act makes the confessing of a judgment by an insolvent "with an intent to give a preference to one or more of his creditors * * * or to defeat or delay the operation of the act," an act of bankruptcy, whether there was any special or distinct purpose to thereby defraud the other creditors or not. The fact is, and so the act seems to assume, that the giving of such a preference necessarily operates as a fraud upon the other creditors, because it must, if allowed, deprive them of their just proportion of the insolvent's assets.

But the *intent* to prefer being made an ingredient in the act of bankruptcy, ought to be alleged in the petition and may be denied in the answer. Still, unless it appears that the judgment was confessed in ignorance of the respondent's insolvency, or otherwise, so that it *could* have been done without intending to give a preference; the intent to prefer is a necessary inference from the premises.

In re Drummond (supra), the Court says: "Now, it is a rule that every sane man is presumed to intend the probable consequences of his voluntary act. The consequence of this transfer by Drummond of all his property to a portion of his creditors, was not only that it would probably give them a preference, but that it *would necessarily and certainly produce that effect*. He must have known that this consequence would follow that act, and he must, therefore, be *conclusively presumed to have intended it*. In so doing, he

In re Robert A. Sutherland.

committed an act of bankruptcy, and a judgment that he is a bankrupt must follow."

Here, as has been said, the answer tacitly admits the insolvency of the respondent and his knowledge of it at the time he confessed the judgments. This being so, the necessary consequence of the respondent's act was to give a preference to the creditors in the judgment. The answer, even if it contained an explicit denial of the intent to prefer, admits the case stated in the petition, because it admits the facts, and alleges nothing in avoidance or to the contrary, which conclusively prove that a preference was in fact necessarily given. This necessary consequence of the respondent's conduct in the premises, the law, in the absence of sufficient allegation or proof to the contrary, presumes was by him intended.

But the answer only denies that the judgments were confessed with a *fraudulent* intent to give a *fraudulent* preference. This kind of negative allegation involves what the books call an *affirmative implication* that the judgments were confessed with an intent to give a preference, though not a *fraudulent* one. This is an implied admission that a *preference* was intended to be given by the respondent. The act (§ 39) in effect prohibits an insolvent debtor from giving *any* preference, for *any* reason, to *any* creditor, upon pain of being declared a bankrupt therefor, on the petition of his injured creditors.

The petitioners are entitled on the pleadings to have the respondent adjudged a bankrupt. Judgment accordingly.

J. W. Whalley and M. W. Fechheimer, for petitioners.

David Logan, for respondent.

John R. Lamb v. Lewis M. Starr.

CIRCUIT COURT, JANUARY 31, 1868.

JOHN R. LAMB AND EMMA, (*his wife*), AND IDA SQUIRES v. LEWIS M. STARR, JAMES P. O. LOWNSDALE, MILLARD O. LOWNSDALE, (*by his guardian, said James P. O.*), RUTH A. LOWNSDALE, (*by her guardian, John Blanchard*), MARY E. COOPER, AND HIRAM AND HANNAH SMITH.

It need not be stated in a pleading, that an alleged trust concerning lands was created by writing, and it will be presumed to have been so created until the contrary appears; the statute of frauds, which requires such trusts to be created or evidenced by writing, is a rule of evidence, but not of pleading.

A demurrer which states a fact not appearing on the face of the pleading demurred to, is a speaking demurrer, and will be overruled.

A grant under section 4 of the Donation Act (9 Stat. 497), to the *children* of Nancy Lownsdale, the wife of a settler under such section, includes the children of said Nancy, by a prior husband.

The Donation Act does not declare who are the *heirs* of a settler or his wife, under section 4 thereof, upon the death of either, before the issuing of a patent, and the grant over in case of such death to the "children or heirs" of such settler or wife, ought to be construed to take effect first in favor of the former.

Under the Donation Act, a settler upon the public lands in Oregon, might change his location and settlement as often as he saw proper, before making final proof and receiving a certificate, and in case of his death before the completion of his residence and cultivation, his widow might abandon her interest in his donation, and by becoming the wife of another settler, be entitled to receive one half of the donation of the latter husband.

The Donation Act does not include settlers upon the public lands, who died before its passage—September 27, 1850.

Where the title of the complainant, whether legal or equitable, is not doubtful or suspicious, equity will take jurisdiction and decree partition, whether the complainant be in the actual possession or not; but in the case of an alleged legal title, if either of these objections appear, it is usual to send the complainant to a Court of law, to try his title, and retain the suit to await the result; and in case of an equitable title a Court of equity first ascertains the title, and if found for the complainant, then makes partition.

The possession of one tenant in common, is that of his co-tenant, and where possession is necessary, such co-tenant may maintain a suit for partition upon such possession.

John R. Lamb v. Lewis M. Starr.

In equity a defendant is not entitled to plead more than one plea, without leave of the Court, and such leave will only be given when the necessity therefor is obvious.

DEADY, J. This is a suit for partition of block 218, situate in the city of Portland, and to declare void a purchase thereof by the defendant, Starr, because the conveyance was taken by Starr, with notice, and in violation of certain trusts with which the property was charged in the hands of Starr's grantors.

Among other things the bill states, that on April 15, 1854, Nancy Lownsdale died seized of an estate in fee in the west half of donation claims 40 and 66, containing 90 acres of land and embracing block 218 in the city of Portland, leaving as her heirs-at-law, her four children, William Gillihan, Isabella Ellen Gillihan, Millard O. Lownsdale and Ruth A. Lownsdale, and her husband, Daniel H. Lownsdale, each of whom was thereupon entitled and became seized of an undivided one fifth of said west half including said block.

That in January, 1860, the said Daniel H. purchased from said Isabella Ellen, her interest in the estate of her mother, Nancy Lownsdale.

That on April 1, 1858, said Daniel H. conveyed by deed of quit claim, without covenants, all his interest in block 218, to Lansing Stout, upon trust, that the said Stout would raise money upon said interest to pay the debts of said Daniel H.; and that on the same day and year, the said Stout, for the purpose of enabling Alonzo Leland to assist him in the performance of said trust, conveyed to said Leland by deed of quit-claim, an undivided one half of his interest in said block upon the trust aforesaid.

That on December 12, 1863, upon an execution issued out of the Circuit Court for the county of Multnomah, State of Oregon, against the property of said Stout, said block was sold to the defendant, Starr; and that on December 5, 1864, the said Leland in conjunction with his wife, on his own private account and not in pursuance of said trust, conveyed to the defendant, Starr, his interest in said block;

John R. Lamb v. Lewis M. Starr.

and that at the time of both such purchases by the defendant, Starr, he had full notice of the trust, and well knew that Stout and Leland had no interest in such block except as trustees, and that neither such sales or conveyances to him were made or executed in pursuance thereof.

That on May 4, 1862, Daniel H. died intestate, leaving as his heirs-at-law, Emma Lamb and Ida Squires, the children of his daughter Sarah, previously deceased, and his four surviving children, namely: James P. O. Lownsdale, Mary E. Cooper, Millard O. Lownsdale and Ruth A. Lownsdale, who thereupon were entitled and became seized in fee of an undivided two fifths of the said west half including said block.

That the said heirs of Daniel H. and of said Nancy being seized as tenants in common of said west half, William Gillihan, one of the latter, commenced a suit for partition thereof in the Circuit Court for the county of Multnomah, State of Oregon, in which suit the parties to this suit and divers others were defendants; and that said Court, on May 22, 1865, among other things, decreed, that said Daniel H. in his lifetime was entitled to the one fifth of said west half as the heir of said Nancy, and also to another fifth as the vendee of said Isabella Ellen, one of the heirs of said Nancy, and that said William Gillihan, Millard O. and Ruth A. Lownsdale, were each entitled, as the heirs of said Nancy, to one fifth of said west half; and afterwards, on August 12, 1865, said Court, in said suit, by its decree set apart to said William, Millard O. and Ruth A. in severalty, certain specified parts of said west half, and to the heirs and vendees or claimants under Daniel H. according to their respective interests, the remaining portion of said west half, including block 218; and that by reason of such partition being unequal, it was further provided by said decree, that said William, Millard O. and Ruth A. should have a lien upon the portion of said west half set apart to the heirs, etc., of Daniel H., amounting in the aggregate to the sum of \$39,156.02, of which sum \$1,533.45 was apportioned to said block 218 and decreed to be a lien thereon; and that by

John R. Lamb v. Lewis M. Starr.

reason of such decree and partition, the said heirs of Daniel H. became the owners in fee of the other three fifths of said block, subject to the lien aforesaid.

That said lien has been paid by the defendant, Lewis M. Starr and the heirs of Daniel H.; and that said heirs are tenants in common of said block, and are in possession thereof.

That the defendants, Hiram and Hannah Smith, claim some right in said block, of which complainants have no knowledge or information.

That the complainants are entitled to an undivided one fifth of said block, and that the other heirs of Daniel H. are entitled to one fifth each, subject to the claims and interest, if any, of said Starr, and said Hiram and Hannah Smith.

That the complainants are residents and citizens of the State of Kentucky, and that their interest in said block exceeds in value the sum of five hundred dollars.

The defendant, Starr, demurs to so much of the bill as sets up the trust to Stout and Leland and the violation thereof by the sales to him. To the remainder of the bill he pleads three pleas in bar of the right to the partition prayed for.

The first and fifth causes of demurrer may be considered together. They are, substantially, that it does not appear from the bill that the alleged trust was in writing, and subscribed by either Lownsdale, Leland, or Stout.

The Oregon statute (Or. Code, 341), prescribes that no trust in real property can be created otherwise than by operation of the law or an instrument in writing, subscribed, etc.

For the demurrer it is maintained that the bill must show affirmatively that these alleged trusts were created by writing. But the rule of law appears to be otherwise. At common law a trust in real property could have been declared or created by parol. Since the statute (*Car. 2, C. 3, § 7*) required such trusts to be in writing, it has been uniformly held that the statute did not change the rules of pleading,

John R. Lamb v. Lewis M. Starr.

but only introduced a new rule of evidence. That it was still competent to declare or count upon contracts within the statute according to their legal effect, without alleging that they were in writing. If the defendant wishes to take advantage of the statute he must plead it. The demurrer is deemed to confess the trust, as being in writing, however the fact may be. (Gould's Plead. C. IV, §§ 43, 44, 45; Chit. Plead. 254, 332.) True, these are works which treat of pleadings at law, but I do not find any different rule laid down for pleadings in equity. Throughout Story's Equity Pleadings, it is constantly assumed that a contract within the Statute of Frauds may be stated in a bill according to its legal effect, and until the contrary appears, it will be presumed to be in writing. And the same work declares that a plea of the Statute of Frauds is the proper mode of putting in issue the fact of whether the contract was in writing or not. (Story's Eq. Plead. §§ 761, 762, 765.) In *Harris v. Knickerbacker* (5 Wend. 643), Mr. Justice Marcy lays down the rule in equity as follows:—"I apprehend that it is now settled, that if the defendant admits the agreement and insists on the statute, he can protect himself from a decree for a specific performance, notwithstanding his admission; but if he admits the agreement, but neither pleads the statute nor insists on it in his answer, he is deemed to have renounced the benefit of it. (6 Ves. 39.) *If the bill states generally a contract which the law requires to be in writing, the Court will presume that it was made with the requisite formalities, to give it validity until the contrary appears.* The defendant, in answering, may either plead that the contract was not in writing, or insist upon that fact in his answer. If he meets the allegations of a contract in his bill with a general denial, and the complainant is put to his proof to establish it, he must show a written contract; and if he does not, the evidence to establish the issue will be adjudged incompetent." (See also, 1 Smith's Chancery, 225.)

The demurrer in this respect is not well taken. The second cause of demurrer states that it does not appear but

John R. Lamb v. Lewis M. Starr.

that Stout and Leland applied the proceeds of the sale of the block to the payment of the debts of Daniel H.

The bill states that Leland sold and conveyed his interest in the block to Starr on his own private account and in violation of the trust, and that Stout's interest was taken and sold on an execution against his property. From this statement it is plain that the proceeds of the sale did not go to pay the debts of Daniel H., but rather to the payment of those of Stout and Leland.

The third cause of demurrer states that it does not appear but that the debts to be paid were due Stout and Leland.

So far as it appears, no debts were due Stout or Leland. The trust reposed on Leland was by Stout, not Daniel H. If in fact debts were due Stout, and the conveyance was in trust, that he would use or dispose of the property to pay such debts, the defendant must, if he think them material, plead these facts before he can claim the benefit of them. This part of the demurrer in some sort asserts that Daniel H. was or might have been indebted to Stout and Leland, and that this trust was created for the purpose of enabling the trustees to pay such debts. In this view it is liable to the imputation of being a *speaking demurrer*—that is a demurrer where a new fact is introduced to support it. (Story's Eq. Plead. § 448).

The fourth cause of demurrer states that the sales to the defendant Starr, do not appear to have been in violation of the alleged trust.

The bill alleges that these sales *were* in violation of the trust, and the facts disclosed in the bill warrant the allegation of the bill. The trust was to pay the debts of Daniel H. generally, and the sales to Starr were to pay the debts of Stout and Leland.

The demurrer is overruled at the costs of the defendant.

The first plea alleges that the defendant Starr, claims under Lansing Stout, to whom Daniel H. conveyed in April, 1858, as in the bill mentioned, and that at the commencement of this suit the complainants were not in the posses-

John R. Lamb v. Lewis M. Starr.

sion of the premises in question, but that said defendant was in sole and exclusive possession thereof.

The second plea alleges that the said Nancy did not die seized of the west half of the donation claim in question, nor could she take any part thereof as the wife of Daniel H., because prior to her marriage with said Daniel H., and while she was the wife of William Gillihan, the said William, in the year 1847, settled upon a tract of the public land on Sauvie's island, in Multnomah county, containing 640 acres, and continued to reside upon and cultivate the same continuously to the time of his death in the year 1850; and that said William, up to the time of his death, complied in all respects with the provisions of the act of September 27, 1850, making donations to settlers upon public lands, etc., whereby upon the death of said William, the same vested in said Nancy and the heirs of said William, and thereby the said Nancy became disqualified to take any part of the donation claim of Daniel H.

The third plea alleges that William Gillihan and Isabella Ellen Gillihan are not the children and heirs-at-law of Nancy, to whom the said west half was patented; and that said William and Isabella Ellen did not in virtue of said patent referred to by complainant, become seized of any part of said Nancy's half of said donation claim.

By section 4 of the Donation Act (9 Stat. 497), there is granted to a married man, who is a settler upon the public land, the quantity of 640 acres, "one half to himself and the other half to his wife, to be held in her own right." The section also provides, that where such married persons have complied with the provisions of the act so as to entitle them to the grant as therein provided, "whether under the late provisional government of Oregon or since, and either shall have died before patent issues, *the survivor and children or heirs of the deceased*, shall be entitled to the share or interest in equal proportions, except," etc.

The question sought to be raised by this third plea is; that only the children of Nancy by Daniel H., the surviving settler, are entitled to any portion of her interest or share

John R. Lamb v. Lewis M. Starr.

in the donation, and that therefore William and Isabella Ellen, the children of Nancy by her marriage with Gillihan, are not entitled to any interest in the block in question.

The first position assumed by counsel in favor of his position is, that the patent or grant to the *children* of Nancy Lownsdale, does not include the *children* of Nancy born while she was Nancy Gillihan. In reply to this, it is sufficient to say, that when Nancy Gillihan changed her name to Nancy Lownsdale, it did not affect her identity or destroy the parental relation between herself and the children which she bore while called by the former name. A grant to the children of Nancy Lownsdale must include all the children of the *person* intended and described by this appellation. The name used is the mere description of the *person* of the ancestor, and does not impute to Nancy any particular status or relation on account of which her children, born during the existence of that status or relation should take the land of the deceased, to the exclusion of her other children, not so born. A grant to the children of the *wife* of Daniel H. Lownsdale under some circumstances might probably be limited to the children born of the wife during the existence of the relation imputed to her in the grant; but a grant to the children of Nancy Lownsdale is not limited by the fact that she was the wife of Daniel H. Lownsdale, to the children born during the existence of that relation.

Another argument in support of this plea assumes that the donation is made to the *community* constituted by the marriage, rather than to the married persons individually, and that, therefore, in case of the death of either member of this community, the share of such deceased member in the common donation, should only go to the children of such community who made the settlement and performed the services which secured the grant.

The idea is not without plausibility and apparent equity and justice. But the statute cannot be so construed without doing violence to its evident purpose and plain language. The act does not give the land to the community consti-

John R. Lamb v. Lewis M. Starr.

tuted by the marriage, but to the married persons individually—"one half to the husband and the other half to the wife, to be held by her in her own right." Besides, at common law, marriage does not constitute a community in which the individuality of the husband and wife is merged and blended for the time being. Such, or something like it, is the doctrine of the civil law, but is not applicable here.

Upon the death of the wife, before the issuing of the patent, the Donation Act disposes of her share in the donation, by providing that it shall go to her husband and *children or heirs* in equal proportions. This description of the persons who are to take the share of Nancy in the donation is plain and unequivocal. The words used are not open to construction. The share is given to *her children* without limitation or qualification. William and Isabel Ellen Gillihan are as much the *children* of the deceased Nancy as Millard O. and Ruth A. Lownsdale. Being *her children*, the Donation Act gives them a proportionate interest in her share of the donation, without reference to the fact of when they were born or by whom begotten.

This conclusion does not involve the question of whether the words *children or heirs* are used in the act as synonymous terms or not. My impression is that they are not, although, as in this case, they *may* coincide and apply only to the same persons. At the death of Nancy—April 15, 1854—there was no statute in Oregon regulating the descent of real property, or declaring who should be the heirs of an intestate, and therefore the subject was regulated by the common law. By this rule her children were her heirs. The Donation Act does not prescribe who shall be considered the *heirs* of a deceased settler any more than it prescribes who shall be considered the *wife* of a settler. Both these are left to the local law—the law of Oregon.

If the law of Oregon at the time of Nancy's death had prescribed that brothers and sisters should be heirs to the intestate either exclusive or inclusive of the children, it appears to me, that under the Donation Act, then the children

John R. Lamb v. Lewis M. Starr.

would take to the exclusion of the brothers and sisters. Congress seems to have intended to secure the share of the deceased, to her children, if any, whether the law of Oregon made them heirs or not. Beyond this it left the matter to the local law, by providing the alternative, that in default of children, such share should go to her heirs, whoever they might be. Who would be entitled to claim *as heir* of the deceased would in all cases depend upon the law of Oregon at the time of the death; but persons claiming *as children* are by the Donation Act preferred to those claiming simply *as heirs* by the local law.

It will be noticed that the plea denies the right of William as well as of Isabella Ellen. The former is not a party to this suit, nor do either of the parties before the Court claim under him.

But if neither had any right in the share of their mother, then Daniel H., as survivor, would take one third instead of one fifth.

The interest which Daniel H. took as survivor, Starr claims under the conveyance to Stout and the subsequent conveyance to himself. Neither is Isabella Ellen a party to this suit, but the complainants claim an undivided interest in the one fifth which their ancestor, Daniel H., is alleged to have purchased from her, subsequent to this conveyance to Stout. As to these interests, the plea, if good in law, would be a bar to the relief sought by the complainants.

The plea is insufficient in law and therefore overruled.

The second plea assumes that the fourth section of the Donation Act, includes settlers upon the public lands who died in Oregon before its passage—September 27, 1850. At least the plea must be so construed; for, although the averment is that Nancy's first husband—Gillihan—died "*sometime* in the year 1850," yet this being uncertain in point of time, must be taken most strongly against the party making it. So construed, the legal effect of the allegation is, that Gillihan died *some time* in 1850, but *prior* to September 27 of that year.

In support of this plea, it is maintained by Starr's coun-

John R. Lamb v. Lewis M. Starr.

sel, that Gillihan having died in the possession of the land claim on Sauvie's island, his wife became entitled to one half thereof in her own right, and therefore she was not qualified to take another donation as the wife of Daniel H. The disqualification relied on is found in the proviso to section 5 of the Donation Act. It reads—"That no person shall ever receive a patent for more than one donation of land in said Territory in his or her own right." Admitting for the moment that Nancy became entitled to the half of the Gillihan donation claim upon the death of the settler, it does not appear that she ever obtained a patent for it, or took any steps to assert such right in the proper land office of the United States, or elsewhere.

It has always been understood, and there is nothing in the Donation Act to the contrary, that a settler upon the public lands, might change his location and settlement as often as he saw proper, before he filed his notification of selection in the land office, and probably at any time before making final proof and receiving a certificate. In such case the first location is abandoned and the land is open to any other settler who may choose to take it up. A wife cannot become a settler and take land for herself independent of her husband. While he lives, her action in this respect is subordinate to his. But if, upon the death of the settler, the wife becomes entitled to take one half of the land upon which he died, pending the performance of the condition of residence and cultivation, she may then abandon that right and by becoming the wife of another, be qualified to take her share in the donation of the latter husband. In such case, it is certain, that she will never receive a patent for more than one donation, for as to the settlement of the former husband, she does not claim any interest in it or make proof of any right thereto.

Again, it appears by the plea, that Gillihan died before he had "complied with the provisions of the act"—his settlement commencing in 1847, and his death occurring in 1850, before the completion of the four year's residence and cultivation. If it be the law, as this plea assumes, that the

 John R. Lamb v. Lewis M. Starr.

grant in section 4 of the act is not confined to persons in being at the passage of the act, but that it includes settlers upon the public lands prior thereto, yet, at least, such settlers must have completed the four years residence and cultivation required by the act, before it can be claimed that "they have complied with the provisions of this act so as to entitle them to the grant as above provided." (9 Stat. 497). Certainly, there is no provision of the act which disposes or gives to any one the land occupied by a settler, who died before the completion of the four years residence and cultivation, and prior to the passage of the act. Section 8 does not help the plea in this respect, for that manifestly contemplates only the case of the death of a settler *after* the passage of the act. "To give that section any other than a prospective operation is to do violence to its language; and the mischief resulting from giving it a retro-active effect, would be infinitely greater than would follow from a like construction of section 4." (*Ford v. Kennedy*, 1 Or. 168).

As has been already stated, this plea assumes that section 4 of the Donation Act includes settlers upon the public lands who died in Oregon before the passage of the act. If the act does not warrant this assumption, then this plea is insufficient, without reference to the points already considered.

As the section stands, its length and the multiplicity and variety of provisions and qualifying clauses which it contains, not affecting this question, naturally tend to obscure the actual connection and dependence which exist between those different parts of it, that prescribe *who* may take under it. Read with these, at present immaterial clauses eliminated, the section declares—"That there shall be and hereby is granted to every white settler or occupant of the public lands, * * * *now residing in said Territory* (Oregon), and who shall have resided upon and cultivated the same for four consecutive years, * * * if a married man, * * * the quantity of one section, * * * one half to himself and the

John R. Lamb v. Lewis M. Starr.

other half to his wife, to be held by her in her own right;
* * * and in all cases where *such* married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the provisional government of Oregon, or since, and either *shall have* died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions."

It is only necessary to read the section carefully to see that the "such married persons," must refer to the antecedent—a settler upon the public lands *now* residing in said territory, and his wife—whoever and wherever she may be.

This settles the question against the plea; Gillihan was dead when the act passed. No grant is made to the dead husband, nor does any enure to his widow. The woman only takes on account of her *wifeship*, and not as a *settler*. (*Vandolf v. Otis*, 1 Or. 156, 157.)

The words, "and if either shall have died before patent issues," are easily reconciled with this conclusion; and if there is any difficulty in so doing, they must yield to the clear and unqualified language descriptive of the person to whom the grant was made, or offered. The subsequent provisions of the section providing for the disposition of the donation upon the contingency of the donee's death before the issuing of the patent, cannot be allowed by implication to enlarge the terms of the grant.

The act contemplates and provides for the issuing of a patent to the settler and his wife at some future time. In the meantime, and after the performance of the conditions prescribed by the act, the settler or his wife might die. In contemplation of this contingency, which might happen before the issuing of the patent, both events being in the future, the section properly and grammatically declares, "and if either (the settler or wife) shall have died before patent issues, the survivor and children or heirs of the deceased, shall be entitled to the share or interest of the deceased, in equal proportions."

This is the construction which was given to this section

John R. Lamb v. Lewis M. Starr.

by the Supreme Court of the late Territory of Oregon in *Ford v. Kennedy* (*supra*); and I think the decision in that case has been generally accepted as correct, by the profession. The evils which would have resulted from a contrary construction are not exaggerated in the following citation from the opinion in that case by Ch. J. Williams:

“To construe the Donation Act so as to invest persons, dead before its passage, with an inheritable interest in the public lands of this Territory, would be not only to give the said act a retrospective operation, contrary to a sound construction of the statute, but to open a Pandora box of evils upon the community; for the heirs of these early settlers, who died before 1850, would rise up with their unknown and undiscoverable titles to supplant others who found the land, thus claimed, vacant, and took it, in good faith, as a part of the public domain.”

This plea is insufficient and must therefore be overruled.

The first plea assumes that a party *not* in possession cannot maintain a suit in equity in this Court for partition. The ground of this objection is section 419 of the Civil Code (Or. Code, 255), which enacts that “persons who hold and *are in possession* of real property as tenants in common,” may maintain a suit in equity for partition.

Counsel for the defendant argues that this statute limits the jurisdiction of this Court, as a Court of equity. No authority was cited in the support of this position, but section 34 of the Judiciary Act (1 Stat. 81) seemed to be relied upon. This section provides, that, “The laws of the several States, * * * shall be regarded as rules of decision *in trials at common law*, in the Courts of the United States, where they apply.”

But this section, as its language plainly imports, does not extend to suits in equity, and it has even been construed not to extend to *criminal* cases at common law. (*United States v. Reid et al.*, 12 How. 363.)

The jurisdiction of the Courts of the United States in equity is not affected by the statutes of the State. (*Robinson v. Campbell*, 3 Whea. 222; *United States v. Howland*, 4 Whea.

John R. Lamb v. Lewis M. Starr.

115.) In this last case Chief Justice Marshall says—"As the Courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers upon all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States." (See also *Russel v. Southard*, 12 How. 147.) In *Neves et al. v. Scott et al.* (13 How. 272), the Supreme Court say—"Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the Courts of the United States, and for this Court in the last resort, to decide what those principles are, and to apply each of them to each particular case, as they may find justly applicable thereto. * * But in all the States, the equity law, recognized by the Constitution and by acts of Congress, and modified by the latter is administered by the Courts of the United States, and upon appeal by this Court."

The equity jurisdiction of this Court not being limited by section 419 of the Civil Code, the right of the complainants to maintain this suit for partition against Starr, depends upon the general principles of equity jurisprudence. The jurisdiction of a Court of equity over a suit for partition, so far as I have been able to ascertain, never did depend upon the possession by the complainant. Where the title of the complainant, whether it be legal or equitable, is not doubtful or suspicious, equity will take jurisdiction and decree partition, without reference to the question of possession. But in the case of an alleged legal title, when either of these objections appear, it is usual, first to send the complainant to a Court of law to try his title, and in the meantime retain the bill to await the result. In the case of an equitable title the court of equity first ascertains the title, and if found for the complainant, proceeds to make partition. (*Wilkin v. Wilkin*, 1 John. Ch. 117; *Coxe v. Smith*, 4 Id. 276; *Matthewson v. Johnson*, Hoff. Ch. 562; 4 Kent's Com. 364.)

But even if the possession by the complainants was necessary to enable them to maintain this suit, they must be

John R. Lamb v. Lewis M. Starr.

deemed to be in possession. The possession of one tenant in common is that of his co-tenants. (*Hitchcock v. Skinner*, Hoff. Ch. R. 24). This decision was made under a statute word for word like ours. In *Brownell v. Brownell* (19 Wend. 369), the Court in commenting upon the same statute, say: "Possession would follow the legal title, no adverse possession having been shown. The provisions of the statute * * * do not require a *pedis possessio* to entitle a party to institute proceedings in partition."

In this case, the plea under consideration states that the defendant is in the exclusive possession, but it also discloses the fact that his *right* to the possession depends upon the deed of Daniel H. to Stout, and the mesne conveyances thereafter to himself. The plea is not accompanied by an answer denying the trust upon which that deed was made to Stout and his own knowledge of it, when he acquired the title conveyed to Stout. For aught that appears in the plea, Starr may simply hold the legal title to the interest conveyed to Stout in trust for the complainants. But waiving this consideration, as the matter now appears, there can be no pretense that Starr acquired any other interest in the block, than Daniel H. conveyed to Stout. The plea does not claim any more than this. Yet two years after the conveyance to Stout, Daniel H. purchased the interest of Isabella Ellen in the estate of her mother. This was an undivided one fifth. This interest descended to the complainants in common with the other defendants, heirs of Daniel H. The deed to Stout was a simple quitclaim without covenants, and does not affect the after acquired interest of Daniel H. Allowing Starr then all the interest which he can or does claim by virtue of the conveyance to Stout, the complainants are at least seized of an undivided interest in the block. They and he are tenants in common, and his possession is theirs for the purpose of this suit. (*Barnard v. Pope*, 14 Mass. 437.)

This plea being insufficient must be overruled.

As a matter of practice, it is proper to add that in equity a defendant is not allowed to plead more than one plea to

James Fields v. Ida Squires.

the bill, without special leave of the Court first obtained, and such leave will only be given in particular cases, when the necessity therefor is obvious. (Story's Eq. Plead. § 657.)

In this case no objection was made by the complainants, and the pleas were treated as if pleaded with leave of the Court.

W. W. Page and W. Lair Hill, for complainants.

W. W. Chapman, for defendant Starr.

CIRCUIT COURT, FEBRUARY 15, 1868.

JAMES FIELDS v. IDA SQUIRES, BY HER GUARDIAN, WILLIAM E. COOPER.

The assignee of a covenant for title, may maintain a suit to enforce the performance of such covenant, against the heir of the covenantor, to the extent of the interest inherited, although such covenant was the joint covenant of the ancestor and another, and such heir is not named therein. A covenant which runs with the land, is divisible into as many parts or interests as the land itself may be divided by subsequent successive conveyances, and the grantee of each parcel or interest may, as to the same, maintain suit upon such covenant against the original covenantor, or his legal representatives.

The Donation Act (9 Stat. 497), does not include settlers upon the public lands in Oregon, who died before its passage—September 27, 1850.

One half of the land taken by a married settler, under the Donation Act, be it more or less, enures to the benefit of the wife; and she takes the same in her own right, as the direct donee of the United States, and not subject to any of the previous acts or contracts of the husband.

A grant to a settler under the Donation Act, does not take effect prior to the passage of such act, although made in consideration, or on account of prior residence and cultivation thereon.

On June 25, 1850, no law had been passed by Congress for the disposal of the public lands in Oregon, and it was well known to all persons resident therein, that no one had any interest in such lands, except the bare possession, and on said day Lownsdale, Coffin and Chapman, by their deed, wherein they described themselves as proprietors of the town of Portland, Oregon, for a valuable consideration "thereby released, quit claimed and confirmed" unto said Chapman, block G in said town, and delivered him

James Fields v. Ida Squires.

the possession thereof; said deed contained two covenants—one of warranty against all claims, the United States excepted, and the other to convey the title of the United States if the covenantors obtained the same: *Held*, that the grantee in said deed took nothing thereby, except the actual interest of the grantors at the time—the possession.

By the first of said covenants, Lownsdale, and those claiming under him, are rebutted from claiming any interest in block G, however acquired, except an interest or title derived from the United States.

Nancy Lownsdale, the wife of a settler under section 4 of the Donation Act died intestate, after the provisions of such act had been complied with, and before the issuing of a patent for the donation, leaving her husband and four children living: *Held*, that her estate in the land was a qualified fee, and terminated with her life, and that the remainder was given by said section 4 directly to said husband and children in equal parts, who took the same as the donees of the United States, and not as the heirs of said Nancy; and that the interest thus acquired by said husband, is within the second of said covenants—the one for further assurance.

A covenant to convey a particular title if after acquired by the covenantor may be enforced by a suit in equity, if such covenantor neglect to perform the same, without a prior demand and refusal.

The possession delivered with the deed of June 25, 1850, was a sufficient estate to carry the covenants therein to the assignee thereof.

The prohibition contained in the proviso to section 4 of the Donation Act, does not include covenants or contracts made prior to the passage of such act.

The deed of June 25, 1850, is not within section 6 of the act of September 29, 1849, to regulate conveyances, and therefore cannot be construed as containing any covenants not specially set forth therein.

In the year 1860, Lownsdale being the owner of one fifth of Nancy's share of their donation as above stated, purchased the interest of Isabella Ellen, one of Nancy's children and died intestate, in 1862, leaving children; in 1864, the proper Court of the State partitioned said Nancy's share of the donation, by giving three fifths thereof to the three children of Nancy, and the other two fifths to the heirs and vendees of said Lownsdale, and because of the inequality of said partition, required the two fifth tract to pay a certain amount of owelty to said children of Nancy: *Held*, that by this partition, Nancy's three children were divested of their interest in the two fifth tract, and Lownsdale's heirs were divested of their interest in the three fifth tract, and that Lownsdale's prior vendees of any particular parcel in this two fifth tract neither gained or lost by this partition, but can only claim that interest therein which their deeds from Lownsdale entitle them to, discharged from the owelty.

Estoppel *in pais*, what declarations and conduct of party insufficient to create.

DEADY, J. By this suit the complainant seeks to have his title to the north half of block G in the city of Portland ascertained and declared, as against the defendant, and also

James Fields v. Ida Squires.

to obtain a decree against such defendant for specific performance of the covenant of her ancestor for further assurance, in regard to said block.

From the bill it appears, that on June 25, 1850, Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman, had surveyed and laid off divers lots and blocks in the town of Portland, and made a map thereof, designating the same by numbers and letters, and being in possession, said Lownsdale, Coffin and Chapman by deed of that date, assumed and represented themselves to be the proprietors of the town of Portland, and "for a valuable consideration, thereby released, quitclaimed and confirmed, unto the said Chapman, to have and to hold to him and his assigns forever, a certain two acre block of land, situate in said town, and represented upon the map thereof by the letter G, and then and there delivered to him the possession thereof. That the said grantors in and by said deed covenanted to and with the said Chapman, that the property aforesaid, unto him, his heirs and assigns, they would warrant and defend against all claims, the United States excepted; and that if they should obtain the fee simple of said property from the United States, they would convey the same to the said Chapman by deed of general warranty."

That on March 7, 1851, Chapman sold and conveyed the north half of said block G to William Dobleblower, and gave him possession, and that on August 27, 1852, Dobleblower sold and conveyed said north half to complainant, and gave him possession, which possession he still retains.

That on September 22, 1848, said Daniel H. being a widower and unmarried, settled on the tract of land embracing block G, and containing less than 320 acres, and continued such residence and settlement for more than four years thereafter, and thereby became the owner of the same under the Donation Act of September 27, 1850.

That in the year 1850 or 1851, Daniel H. intermarried with Nancy Gillihan, the widow of William Gillihan, and in April, 1854, said Nancy died intestate. In the year 1862, Daniel H. died intestate. On October 17, 1860, a patent

James Fields v. Ida Squires.

certificate issued from the U. S. land office, at Oregon City, for the land settled by Daniel H., to him and the heirs-at-law of his deceased wife, in which certificate, the west half of said tract of land embracing block G, was assigned to said heirs-at-law.

That at the time of the marriage, between Daniel H. and said Nancy, the former was the father of three children by a former wife—namely: James P. O., Mary E., and Sarah; and the said Nancy was the mother of two children by her former husband—William Gillihan—namely: Isabella Ellen and William.

That in the year 1848, Nancy and her former husband—Gillihan—settled on a tract of land, situate on Sauvie's island, in Multnomah county, containing less than 640 acres, and continued to reside upon and cultivate the same, until some time in the year 1850, when said Gillihan died—having done and performed all things in and upon said land, as contemplated by the said act of September 27, 1850, up to the time of his death, by means whereof the widow of said Gillihan became and was entitled to the one half of said tract, and is therefore not entitled to any part of the donation claim of said Daniel H.

That, if notwithstanding the premises, the said Nancy was entitled to a part of the donation claim of the said Daniel H., she had notice, and good reason to be informed, that the said Daniel H. had sold and conveyed block G as aforesaid, "and that she took such part subject to the contract aforesaid of the said Daniel H., and that her heirs and assigns are bound thereby."

That on the death of Daniel H., he left as his heirs-at-law, the said James P. O., Mary E. (now wife of William E. Cooper), and Ida Squires the defendant, and Emma Lamb, children of the said Sarah, deceased, and Millard O. and Ruth A., children of the said Daniel H. and Nancy; and that on the death of the said Nancy, she left as her heirs-at-law, the said William and Isabella Ellen Gillihan and the said Millard O. and Ruth A. Lownsdale.

That in the year 1860, Daniel H. purchased from the said

James Fields v. Ida Squires.

Isabella Ellen (then intermarried with William Potter) and her husband, "all the right, title and interest of the said Isabella in said tract of land as the heir of said Nancy;" and that by means of the death of said Nancy and the purchase aforesaid, the same Daniel H. became "the owner and holder of the title of the government of the United States of two fifths of the lands alleged to be patented to the said heirs of Nancy," including block G, and that thereupon "the said two fifths interest in the north half of said block enured to the use and benefit of the complainant."

That in 1864, the said William Gillihan, Jr., by his guardian Martin Gillihan, commenced a suit in the Circuit Court for the county of Multnomah, State of Oregon, for a partition of the tract of land patented to the heirs-at-law of Nancy, claiming in such suit to be entitled to one undivided fifth thereof; and that the heirs-at-law of both Daniel H. and Nancy, as well as the grantees and assignees of the former were made parties to such suit; and that by the decree rendered therein, the said two fifths of said tract of land was recognized as having belonged to said Daniel H., "with all the equities in partition." And divers lots and blocks in said tract having been before then laid off and "disposed of" by the said Daniel H. and improved by different persons, were allotted to the heirs, grantees and assignees of the said Daniel H.; and to make partition equal the said lots and blocks were severally encumbered with large sums of money, which if not paid within a specified time, should be sold to pay the same; and that if any claiming under the said Daniel H., and paying such assessments, should be afterwards evicted, that the sum so paid and interest should continue a lien on the particular tract for reimbursement. That the said block G was among the blocks so assigned in partition to the heirs and grantees of the said Daniel H., and the sum of \$998.79, and \$—— costs, was assessed upon the north half of said block, which the complainant was compelled to and did pay to prevent the same from being sold.

That the defendant, Ida Squires, though a resident and citizen of Kentucky, had a guardian (the said William E.

James Fields v. Ida Squires.

Cooper), a resident of the city of Portland, and that said guardian and his ward well knew that the complainant was about to pay said sum, claiming this property as his own, yet neither of them made any objection thereto, but suffered and encouraged the complainant to pay the same: "Whereby the said Daniel H. in his lifetime and his heirs-at-law since his death, became and are bound to convey the said half block to your orator, by a good and sufficient deed;" and that the said Ida Squires, by virtue of the covenants in the deed of June 25, 1850—the possession of the complainant, and the said decree and the payment of the assessment thereunder is estopped to set up the title of the said Daniel H., so obtained as aforesaid, as a defence to the suit of the complainant.

That the defendant paid Dobleblower \$250 for the premises in question, and has since expended about \$2,700 in improving the same, and that his possession from the date of such purchase until the present time has been visible and notorious, to the knowledge of Daniel H. and Nancy while living, and of the heirs of the former since his decease; and that at the date of such purchase, Daniel H. "assured the complainant that the title was good," which assurance said Daniel H. in his lifetime 'frequently' repeated to the complainant—by means whereof the defendant as heir-at-law of Daniel H., is estopped and ought to be barred from asserting any claim to the premises, or denying your orator's right thereto."

The defendant demurs to the bill, and maintains in argument, that upon the facts stated, the complainant is not entitled to any relief.

The objections of the defendant, as specified in the demurrer and developed and amplified on the argument, involve the consideration of questions, some of which, besides being interesting in themselves, are of the highest practical importance to this community.

The deed is objected to as inoperative and void because Chapman is both grantor and grantee, covenantor and covenantee, therein. Of course, Chapman could not grant to

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himself or covenant with himself. So much of the deed may be treated as surplusage—a blunder of the scrivener. There still remains, the grant and the covenants of Lownsdale and Coffin to and with Chapman, and these are easily and fairly divisible and separable from the void and repugnant grant and covenants by Chapman to and with himself.

Waiving this objection, it is further objected, that the covenants with Chapman by Lownsdale and Coffin are joint and not several, and that therefore the remedy upon them must be joint—against both Lownsdale and Coffin or their representatives.

Counsel for the complainant maintains that equity will treat these covenants as joint or several, and among others cites, *Duvall v. Craig* (2 Whea. 45, and 1 Story's Eq. 162-3). But neither of these authorities support the position. In *Duvall v. Craig* (*supra*), the question was not whether the covenant could be treated as *joint* or *several*, but what constituted a *breach* of it. The case only decides that a joint covenant against encumbrances is broken by an encumbrance suffered or done by a part of the covenantors, and that all the covenantors are liable for such breach. To the same effect is *Meriton's* case (Noy's R. 86) cited in the note to *Duvall v. Craig*. There the lessors covenanted against any encumbrance made by *them*. One of the lessors made a lease to a stranger. In an action on the covenant against *both* lessors, it was held that the act of *one* constituted a breach, for which the lessors were jointly liable.

The citation from Story only goes to the extent, that in equity a joint debt will be deemed the several debt of each of the contractors in a certain class of cases, from the fact—either proven or presumed from the nature of the transaction—that each of the contractors had the benefit of the money advanced, or that the joint obligation has been given to pay an antecedent debt, for which all the obligors were severally liable. But “when the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived.” (1 Story Eq. 163.) The general rule upon this subject seems to be well ex-

James Fields v. Ida Squires.

pressed in Rawle on Covenants, 578—"Whether the liability created by the covenant be joint *or* several, or joint *and* several, obviously depends upon the terms in which it is expressed. Where an obligation is created by two or more, the general presumption is that it is joint, and words of severance are required in order to confine the liability of the covenantor to his own acts."

In support of the text the author cites among others, *Comings v. Little* (24 Pick. 266). In this case the Court say, "The distinction is this: Where a man covenants with two or more jointly, and the interest and cause of action of the covenantees is several, each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. But when two persons covenant jointly with another, a joint action lies for the covenantee on a breach of the covenant by one of the parties only, because they are sureties for each other for the due performance of the covenant."

In the case under consideration the covenants are *joint*—they are the *joint* contracts of Lownsdale and Coffin with Chapman. An action at law for the breach of these covenants could not be maintained against either of the covenantors separately. But this is a suit in equity, not for damages for a breach, but to declare the legal effect of the one covenant and obtain the specific performance of the other, as against the heir of one of the covenantors *on account of her interest in the land* embraced in the covenant of her ancestor. As appears, Coffin has no interest in the land and can claim none. At the date of these covenants this was public land of the United States, and it must have been within the contemplation of the parties that if the property was subsequently acquired from the United States, it would be by one of the covenantors and not all of them. In such a case, I think the rule of law applicable to actions at law wherein the covenantee seeks to recover damages from the covenantors for a breach of the covenant, does not apply.

The defendant as heir-at-law of Lownsdale appears to

James Fields v. Ida Squires.

have inherited a separate interest in the property in question, of which the complainant by this suit seeks to obtain a conveyance on account of the covenant of her ancestor. The suit is to enforce performance of this covenant, not as a whole but as to a separate interest, which has descended to this heir, and as to such interest no other person is liable or interested as defendant; nor can such covenant be enforced in this particular against any other person, than this defendant.

Counsel for the defendant also object that the heir is not liable upon these covenants, because not named therein. The authorities cited in support of this position, are cases that arose under the ancient feudal warranty, and not the personal covenants contained in modern conveyances. Common law warranty was created without covenant, and was a natural incident of the feudal tenure. By the joint operation of the Statutes *de bigamis* and *quia emptores*, the law was changed so that this warranty did not have the effect to bind the heirs unless mentioned in it. (Rawle on Covenants, 2, 3, 203.) The authorities cited refer to this kind of warranty and are not applicable to the case under consideration.

The covenants in this deed are deemed to run with the land, "and pass to the heirs of the purchaser and also to all persons claiming under him, who may maintain actions against them, against the vendor or *his heirs*." (Cruise's Dig. T. 32, C. 26, § 66.) In support of this rule the author last quoted cites from 4 Ves. 370, as follows: "Rachel Boyes and her son conveyed a copyhold estate to a mortgagee by lease and release and covenanted for further assurance. The son died; and the mortgagee filed his bill against the customary heir of the son, who was an infant; praying that he might be decreed to surrender the estate to the plaintiff. The Master of the rolls (Sir R. P. Arden) said, he was clearly of the opinion that this covenant was a contract for a valuable consideration, *affecting the land and would affect the heir*. And by the decree it was declared that the covenant in the mortgage deed, bound the land descended to the defendant."

James Fields v. Ida Squires.

To the extent which these covenants affect the land, the heir is bound by them, though not named in them, so far as any interest which she may have by descent from the covenantor. Being so bound, the grantee or his assigns are entitled to maintain this suit against the heir, as they would against the ancestor if now living.

Counsel for defendant further object that the complainant is not the assignee of the covenants in the deed, because he is the grantee of only one half of the premises embraced in the deed and to which the covenants relate. This objection rests upon the consideration that the covenantor ought not to be subject to a multiplicity of separate suits, by subsequent grantees of separate parcels of land, which he conveyed and covenanted concerning as a whole. But the law after some fluctuation, seems now to be well settled otherwise.

In 2 Washburne's Real Property, 662, the author says: "The action for breach of this covenant (of warranty), should be brought by him who is the owner of the land, and, as such, the assignee of the covenant, at the time it is broken. Such covenant is moreover *susceptible of division into as many parts or interests*, as the land itself shall be divided into by subsequent successive conveyances, so that if A convey to B two parcels by one deed, with a covenant of warranty, and B sells one of them to C who is evicted by an elder title of the parcel so purchased by him, he may have covenant in respect to the same against A." The same rule is laid down as to *all* the covenants which run with the land in Rawle on Covenants, 354-5. Rawle cites the opinion of Lord St. Leonards (Sugden on Vendors), and says: "This view of the law has been adopted in this country." The opinion cited was upon a similar case to the one put by Washburne. "The better opinion seems to be, that an alienee of one of the estates could maintain covenant against the covenantor where the covenants run with the land, and as such, an action would lie either for damages, which would be measured by the loss of the assignee, as far as he might be entitled to recover it under the covenant, or

James Fields v. Ida Squires.

for an act to be done, e. g. further assurance, which might be confined to the particular proportion of the property. It does not seem that any injustice would arise by suffering several covenants to lie, although it might expose the covenantor to inconvenience, whereas the denial of the right to each assignee might lead to positive injustice, or if not, to greater inconvenience on their part."

One of the grounds for the relief prayed for in the bill, is that Nancy did not take any share or interest in the donation of Daniel H., and therefore Daniel H. acquired the whole of such donation from the United States, including the premises in controversy. The reason alleged is, that Nancy was entitled to a share of the donation of her former husband—Gillihan, and therefore *disqualified* to take a share of the donation of Daniel H., on account of the proviso to section 5 of the Donation Act (9 Stat. 497); "That no person shall ever receive a patent for more than one donation of land in said territory, in his or her own right."

From the statements in the bill, it appears that Gillihan had not completed his four years residence upon the land on Sauvie's island at the time of his death, so as to entitle Nancy to claim as his wife under section 4 of the Donation Act; and moreover, Gillihan being dead at the passage of the act—September 27, 1850—was not comprehended in the grant made by said section 4, and therefore Nancy could not claim a donation as his wife in the land occupied by him during his life. This question must be considered as not open to argument in this Court, and needs no further discussion. (*Ford v. Kennedy et al.*, 1 Or. 166; *Lamb et al. v. Starr*, *Ante*,—.)

But the complainant further contends that Nancy was not entitled to take a share of the donation of Daniel H., because such donation only included the number of acres (320), which he was entitled to hold as a single man, but that if she is allowed to take in such donation, she must take subject to the acts and contracts of Daniel H. before her marriage with him, and of which she *then* had notice.

The facts stated in the bill, from which this conclusion is

James Fields v. Ida Squires.

drawn, are, that Daniel H. settled upon his donation in 1848, and that it contained less than 320 acres. That in 1850 he married Nancy—prior to the passage of the Donation Act, and after the deed to Chapman, of which she *then* had notice.

Upon the first part of this position arises the question:— Can a married man exclude his wife from the benefit of the donation provided for her in section 4 of the Donation Act by simply limiting his settlement to the quantity of land thereby granted to a single man; or, in other words, can a *married* man claim and receive a grant as a *single* man? The language of the section is:—"There hereby is granted to every white settler * * * the quantity of one half section, if a single man, and *if a married man* * * * the quantity of one section * * * *one half to himself and the other half to his wife*, to be held by her in her own right."

The evident policy of the law was to give to husband and wife an *equal* quantity of land, imposing upon the husband, as the head of the family, the burden of performing the services upon which the grant is conditioned, coupled with the right of selection, within the limits of the act, as to place and quantity.

The settlement of a married man is intended for the benefit of his wife as well as himself—to enable her to obtain her equal share of the bounty of the grantor. A married man may occupy less land than the law permits. He may have good reasons for so doing. A particular half section may be deemed of more value than any whole section, open to settlement. In this respect the act commits the interest of the wife to the judgment and thrift of the husband. But he cannot change the law and elect to take as a single man to the exclusion of his wife. The exclusive power of the husband is confined to the selection and location of the land. In any event, the land embraced in the settlement, whether a whole section or less, is granted to the husband and wife in equal parts. Even the division of the donation is beyond his control, as the act vests the power "to designate the part enuring" to each in the officers of the land office.

Neither did Nancy take her half of the donation subject to the deed of her husband to Chapman, whether she had notice of it or not. At the date of the deed and the marriage, this was public land of the United States. None of the parties had any interest in it, or claimed any power over it beyond the bare possession. Subsequently, Congress by statute granted the west half of the donation to Nancy *in her own right*. These words—"to be held by her in her own right," were not inserted in the act without a purpose. It appears that they were placed there for the express purpose of excluding the conclusion that she took in right of or through her husband, and that therefore she would take subject to the previous acts and contracts of her husband—as an heir from an ancestor, or a vendee from a vendor. True, the services upon which the grant is conditioned are to be performed by the husband, yet by the terms and manifest intention of the act, the wife takes and holds as the direct donee of the United States as much as though she was a stranger to the husband. Under these circumstances, Daniel H. had the same power to affect or encumber his neighbor's donation, by a deed to Chapman, as his wife's. The question of notice is immaterial, as there is no privity between Nancy and her husband. (*Carter v. Chapman*, 2 Or. 95.)

Neither did the grant relate back to the date of the settlement by Daniel H. in 1848, so as to give effect to his deed to Chapman, before Nancy became his wife. The grant was subsequent to the marriage, and "Although the act of Congress grants the land on *account* of the prior residence and cultivation, the grant itself cannot be said to take effect before it was made—the time of the passage of the act. A grant of land by statute for considerations transpiring years before, as for military services, takes effect from the date of the grant, and not the performance of the service. In point of time the grant and the cause or consideration of it, may be identical or widely separated." (*Chapman v. School District No. 1, et al.*, *Ante*, 108; *McCrackin v. Wright*, 14 John. 193; *Allen v. Parish*, 3 Ham. 107.)

James Fields v. Ida Squires.

Before considering the nature and effect of the covenants in the deed, it will be necessary and proper to examine the condition of the subject matter described in the premises, and the nature and extent of the interest thereby released, quitclaimed and confirmed. Covenants cannot enlarge the premises of the deed, but the latter may and often do control the former. "The covenant of warranty is often limited and defined by the subject matter of the grant, as where the deed only purports to convey the right, title and interest of the grantor." (2 Washburne's Real Property, 665; *Blanchard v. Brooks*, 12 Pick. 66-67; *Comstock v. Smith*, 13 Id. 120.)

From the language of the bill it might be inferred by a stranger that the grantors in this deed undertook as owners of the *land* to convey the *land*, and that the grantee accepted the conveyance upon the faith of this undertaking or representation. But nothing would be more erroneous than this impression, or more unjust to the parties concerned. As a matter of law and public history, it is well known to the Court, that at the date of this deed the title to lands in Oregon was in the United States, and that no law had been passed to dispose of it. This was as well known to the people of Oregon at that day—the parties to this deed included—as that they were living in a territory, and not a State. At the same time these lands were freely occupied by the inhabitants of the country, holding, as between themselves, under the laws of the provisional government, the bare possession. It is also true, that at the date of this deed and for years before, it was confidently expected that Congress would—as they afterwards did—pass an act donating these lands to actual settlers. In June, 1850, the matter was specially before Congress, and the result was the passage of the Donation Act of September following.

Under these circumstances this deed was made, and it is unreasonable to suppose that it was either executed or received upon the impression that the grantors were the proprietors of the soil or had any interest in it—particularly when it appears that Chapman, the grantee in the deed, was

James Fields v. Ida Squires.

in *fact* one of the grantors and parties in possession. But the most casual examination of the deed itself, will show this to be so. The operative words in the premises of the deed are those of release and quitclaim. And although by the deed as set forth in the bill, the grantors "released, quit claimed and confirmed" the *block of land* to the grantee, yet the natural and legal import of these words is not to assert that the grantors had then any particular estate or interest in the land. This taken in conjunction with the historic fact, that the grantors had then nothing in the block but the possession, with what may be called an expectancy of title from the United States, it may be safely concluded that the deed only passed the actual interest of the grantors—the possession. This was all the grantee took or could have expected at the time; and this is evident from the covenants which he took as security for the future.

These covenants are two in number, and both special or limited. The first is a warranty against all claims—the *United States excepted*; and the second is for special further assurance—that *if* the grantors *should* obtain the *fee simple* from the United States, they would convey the same to the grantee by deed of general warranty. The title of the United States is excepted in the covenant of warranty and in the covenant for further assurance, it is plainly asserted that the title was then in the United States. By this deed only the right to the possession—the then estate of the grantors—passed to the grantee. By the first covenant Daniel H. and those claiming under him are rebutted from claiming any interest in the premises, however acquired, except an interest or title derived from the United States. The title of the United States being expressly excepted from the operation of the warranty, Daniel H., if living, would not be prevented thereby, from asserting such title to the land, if by any means he should acquire it. The same is true of his heir—the present defendant. This covenant is exactly similar to the covenant in *Cole v. Hawes* (2 John's Cases, 203), which was to warrant the bargained premises against all claims, *except the lord of the soil*. In that case the Court

James Fields v. Ida Squires.

held that the warranty did not extend to the title or claim of the lord of the soil—the owner of the fee simple. So here, the title of the then lord of the soil—the United States—is excepted from the warranty. As it appears then from the bill, that the alleged interest of the defendant in the premises is derived from the United States, it is not within the warranty of her ancestor, nor in any manner affected by it. Upon this covenant the complainant is not entitled to any relief against the defendant.

The second covenant binds Daniel H., if he should obtain the fee simple from the United States, to convey the same to the grantee. This covenant is binding upon all persons claiming by, through or under Daniel H. It being decided that Nancy took a share in the donation of Daniel H., it is admitted that the latter never acquired, by any means, more than an undivided two fifths of the premises in question, and that of this interest he died seized, and it descended to his heirs-at-law.

If Daniel H. obtained this interest *from the United States*, it is within the covenant, and his grantee is entitled to a conveyance from the heirs, but if he did not, it descended to the latter unaffected by the covenant.

As to the acquisition of these two fifths, the case is this—Nancy having died intestate, before the issuing of the patent, her share of the donation, by direction of section 4 of the act, went to Daniel H. and her four children in equal proportions. Some years afterwards, Daniel H. purchased the interest of Isabella Ellen, one of these children.

The fifth purchased from Isabella Ellen, was not obtained by the covenantor *from the United States*, and is therefore not within his covenant to convey.

As has been shown, at the date of this deed, it was expected that Congress would or might *give* this land to Daniel H. Upon the faith of this expectation, Chapman took this deed of release to himself, with the covenant of further assurance, if this expectation should be realized. Beyond the right to the possession, as against the grantors, Chapman took nothing by that deed but a possibility—the

promise of a chance—that if Congress gave the land to Daniel H., the latter would convey it to him, his heirs, or assigns. This must have been the understanding and intention of all the parties to the deed at the time. Upon this contingency the deed was made, and the covenants entered into. As to this fifth, the chance failed—the contingency did not happen—and so far the covenant never became operative. Congress gave the land to Nancy, and she dying before patent, this fifth went to Isabella Ellen. The latter by this means became the absolute owner of this interest and could dispose of it as she saw proper. Waiving the question of whether she took as the *heir* of her mother or the *donee* of the United States, it is sufficient that she was neither the child or heir of Daniel H., and did not claim under or through him. Her interest came to her unaffected by any acts or contracts of Daniel H. When the latter purchased it, he in no sense obtained it from the United States, and was therefore not bound, either in law or morals, to convey it to the grantee in the deed of June 25, 1850. (2 Washburne's Real Property, 665; Rawle on Cov. 192; *Comstock v. Smith*, 13 Pick. 119; *Blanchard v. Brooks*, 12 Pick. 66; *Ellis et al. v. Welch*, 6 Mass. 250.)

As to the other fifth, the solution of the question is not so apparent and simple. After careful consideration of the authors and authorities upon the subject—keeping in view in the meantime, the expectation and intention of the parties to the deed, I have concluded that Daniel H. took this interest, not by descent as the heir to Nancy, but directly from the United States, as its donee.

There are only two ways of acquiring real property, one by *descent*, the other by *purchase*. If a person does not take as *heir*, he takes by *purchase*, no matter how he acquires his title.

At the death of Nancy—April 15, 1854—there was no statute in Oregon regulating the descent of real property, or declaring who should be the heirs of an intestate, and therefore the subject was regulated by the common law. By this rule, her children were first entitled to take as heirs,

and her husband never. The Donation Act does not prescribe who shall be considered the heirs of a deceased settler or his wife, any more than it prescribes who shall be considered the *wife* of a settler. Both these subjects are left to the local law—the law of Oregon.

Counsel for the defendant maintain that this grant is within the rule in Shelley's case, and that therefore Daniel H. must be considered as taking by descent from Nancy and not by purchase from the grantor—the United States. The rule in Shelley's case, as a law of property, has always been in force in this State as a part of the common law, except as to devises by will.

If the present case was within this rule, the consequences claimed by counsel would follow. Daniel H. would be considered as taking by descent from Nancy. This being so, he could not be said to have obtained this interest *from* the United States, and therefore it would not be within the operation of the covenant for further conveyance.

Courts and commentators have differed as to the reasons of the rule in Shelley's case, some resting it upon grounds of feudal policy, others upon the policy of the law which prefers descent to purchase, or the technical doctrine of the common law, which would not allow that the fee could be in abeyance—not vested in some one. But it is agreed on all hands that it is a purely artificial rule, often in direct opposition to the real intent of the grantor or donor, and therefore not to be extended by analogy.

By the rule in Shelley's case, if a grant was made to a person for *life*, with remainder to *his heirs* in fee or tail, such person, notwithstanding the words of the grant to the contrary, was deemed to take an estate of inheritance, and might alien the fee and bar the heirs. If he died seized it descended to his heirs, but they were not allowed to take the fee, by force of the grant, as purchasers, but only as heirs, by descent from their ancestor.

But if the remainder is given to any other person than the heir of the first taker, or to such heir *with* another person, or to only a *portion* of the persons constituting the heirs of

James Fields v. Ida Squires.

such first taker, the case is not within the rule, and the persons to whom the remainder is given take under the grant as purchasers. To be in by descent, a person must take as heir—in the quality of heir—and take neither more nor less than the law would give him as heir, independent of the grant. If, by the terms of the grant, the heir is to take exactly what the law would have cast upon him, on the death of his ancestor, the case is within the rule, and he is deemed to be in by descent, and not by purchase. You cannot by any grant or conveyance provide that an estate, after the life of the first grantee, shall go in the exact line of descent, and at the same time the heirs be considered as in by purchase, and not liable to the incidents and burdens of an estate by descent. (IV. Kent's Com. 215, 232; 1 Washburne's Real Prop. 78; 2 Jarman on Wills, 178, *et seq.*; *Richardson et al. v. Wheatland*, 7 Met. 171; *Bond v. Swearingen*, 1 Ham. 395.)

The grant to Nancy took effect from the passage of the act. It was not of an estate for life merely, but of inheritance. Yet by the terms of the grant it was made liable to be determined by the happening of a particular event—namely: her own death before the issuance of the patent. The estate granted her was therefore, what the law calls a qualified or determinable fee, because, although it might have continued forever and descended to her heirs *ad infinitum*, yet it was liable to be determined—terminated—by the happening of this event, by which, its continuance or extent was limited. This event actually happened, and in contemplation of it, the act limited the estate in Nancy's share of the donation over to third persons in equal parts—her husband and children. Upon the determination of her estate in the land, the act in effect granted it over to these persons. Until this event, the husband and children had a contingent remainder in the land, which thereupon vested in them absolutely. This interest they took as direct donees of the United States by force of the grant, and not as heirs of Nancy, who left nothing for them to inherit, because her estate in the land terminated with her death.

They were in by purchase and not by descent. The husband and children derived their interest from the United States, and not from Nancy, and therefore there is no privity of estate between them. (IV. Kent's Com. 9, 126; 2 Washburne's Real Prop. 224, *et seq.*)

In support of the position that Daniel H. took by descent from Nancy, counsel for defendant have cited, *Fizzle et al. v. Veach*, (1 Dana, 211); and *McNairs Admr. v. Hawkins*, (4 Bibb. 390.)

The first case was this: In early days a person entered and surveyed a portion of the public land in Kentucky, and died before the issuing of the patent. In pursuance of the law in such cases the patent issued to the heirs of the person who located the land—afterwards execution issued against the estate of the deceased, and a question arose whether the land could be taken on the writ. If the heirs took as purchasers, of course the land was not liable for the debts of their ancestor, but if they took by descent it was. The Court decided that the heirs took by descent. This is not a case in point. Under the system then in vogue in that country an entry and survey of a particular tract of land amounted to a purchase. Thereafter the locator had the equitable estate, and if he died before patent, it descended to his heirs. It went to his heirs, as heirs, by force of the law of descents, and not by operation of the grant. Then they stood in his place and represented him and were entitled to the patent. (*Bond v. Swearingen, supra*, 178.)

The second case so far as it bears upon this is directly against the defendant.

It was a devise to A and the children of her body lawfully begotten, forever, with provision that after the death of A, the children, whether sons or daughters, were to have the devise equally.

The Court held that the estate was limited for life to A, with remainder to the children, and therefore it came within the rule in Shelley's case, *but for two reasons*. The devise used the words *children* and not *heirs*—a term of *purchase* and not *limitation*. It also gave the devise to the children

James Fields v. Ida Squires.

equally, while the law of descent at the time of the making of the will, cast the estate upon the males to the exclusion of the females and of the former preferred the eldest. The judgment was that the children took by purchase, and not descent. The Court said: "The manner in which the estate is limited over to them" (the children, contrary to the law of descent), "precludes all possibility of their taking by descent."

So in this case, the grant in section 4 limited the estate in the land granted, after the death of Nancy before patent, and without will, not to *heirs*—those upon whom the law would cast it, but to her *husband and children*. Unless the law of descent, independent of the limitations in the grant, would have cast the estate upon the *husband and children*, and in the *proportions* which they took, they take by purchase—as donees of the United States. It is believed that no case can be found which does not agree with this proposition. In these respects a grant by the United States, is to be construed and have the same effect as that of a private person.

The grant in section 4 is not couched in the language of a conveyance, though it must operate and be construed as one so far as practicable. When it provides that upon the death of Nancy, before the issuing of the patent, her husband and children *shall be entitled to the share or interest* in the donation, before granted to her, it may admit of argument whether they take such share by way of remainder or conditional limitation, after the determination of what proved to be only a life estate in Nancy. This is an abstruse branch of the law, and one that has in times past been fruitful of unprofitable subtleties. The question is not material here, for in any view of the case there can be no doubt that the grant is not within the rule in Shelley's case, and that the material conclusion arrived at is correct—that Daniel H. took this fifth as the donee of the United States, and not by descent from Nancy. He was not an heir of Nancy, and could not inherit from her. The Donation Act does not pretend to make him her heir or call him such, and should

James Fields v. Ida Squires.

not be so construed, in the absence of clear and express language to that effect. The object of this act was to make grants of land to actual settlers in Oregon, and not to establish or change the law of descent. The power over this subject, as "a rightful subject of legislation," had been already delegated to the territorial legislature. (9 Stat. 323.)

Had the gift been to Daniel H. of the whole interest of Nancy, upon the contingency that she died without children, it would not be different in legal effect from the case under consideration. Yet the survivor, so far from being thereby made an heir, would take in opposition to and exclusive of the *heirs*. Even if he only was admitted to take an equal proportion *with* them, he would thereby take so much *from* them. The estate was not to go in the ordinary line of succession. The survivor takes that which the law of descent would give to the heirs, and the latter take so much less than they would if claiming *as* heirs. This being so, neither of them take in the character or quality of heirs, but as donees from the United States.

It is also evident that the purpose of Congress was, in case of the death of the settler or his wife, without will, between the date of the act and the issuing of the patent, not to allow the share of the deceased to descend to his or her heirs generally, but to give it first to certain members of the family, without reference to the local law of descent. Independent of the intrinsic justice of this provision, it might have been dictated by a desire to prevent any uncertainty concerning the condition and disposition of the grant, if the grantee should die before patent.

With the conclusion now reached, coincides the justice and equity of this case. As to this fifth it was obtained by Daniel H. under just such circumstances as the parties to the deed contemplated when this covenant was made and accepted—by gift from the United States. The complainant, as the assignee of Chapman, is entitled under the second covenant to a conveyance of this fifth from the heirs or grantees of Daniel H.

Before leaving this subject, it is proper to notice some

James Fields v. Ida Squires.

minor objections to the enforcement of this covenant, insisted on by counsel for defendant.

It is claimed that there is no breach of the covenant for further assurance, because it does not appear that the complainant has devised or demanded any particular assurance or conveyance. Where the covenant is general and does not specify the particular conveyance to be made, but only such as may prove necessary or be advised by counsel, the party claiming under it should demand such a conveyance as he conceives himself entitled to, or counsel shall devise, before he can allege a breach and maintain an action for damages. In such case, until the party bound to make further assurance is advised as to what is demanded or needed, he cannot be said to be in default for not performing it. This is the rule in actions at law for damages, which can only be maintained when an affirmative breach of the covenant is shown. But, I apprehend it will be found that the rule has little application to a suit in equity for the specific performance of a covenant. Such suit is not maintained upon a technical breach of the contract, but upon its continuing obligation, binding the party to perform it specifically. In the absence of any special provision in the covenant to the contrary, the suit itself is a sufficient demand for performance. This covenant is special, and requires the performance of a particular thing—the conveyance of the property if obtained from the United States. A *neglect* to perform such a covenant, for the purposes of this suit, is equivalent to a *refusal* to do so. In this respect the covenant does not differ from an ordinary agreement to convey real property. (Rawle on Cov. 109.)

It is also objected that the defendant is not liable on this covenant to Chapman's *assignee*, because it does not run with the land. The reason given for this position is, that no estate passed to Chapman by the deed—the grantors not having any interest in the land at the time. This was the doctrine of the common law as to conveyances of estates less than freehold, which passed without livery of seizin. (*Nkoe v. Awder*, 2 Cro. Eliz. 417; cited in Rawle, *supra*, 383.) And

James Fields v. Ida Squires.

as under our modern system of conveyancing, freeholds pass without livery of seizin; it was held at one time that the doctrine became applicable to conveyances of such estates, and in case the grantor had no interest in the land, the assignee of his grantee could not sue upon the covenants, because they only passed as an incident of the estate. But this doctrine has been modified substantially, so that it may be said that whenever possession is taken under the deed, there is sufficient estate to carry the covenants to the assignee. (*Beddoes Exr. v. Wadsworth*, 21 Wend. 123; *Slater et al. v. Bawson*, 6 Met. 439; *Rawle on Cov.* 382, *et seq.*)

This doctrine is peculiarly adapted to the early circumstances of this country. For years before the passage of the Donation Act, the right of the settlers upon the land was a mere possession with an expectation of future title from the United States. Under these circumstances, in all the towns, this possession was conveyed and re-conveyed with covenants for the title expected, and it is proper and safe to hold with these authorities that a sufficient estate passed to carry the covenants to the subsequent occupants and assignees.

It is further objected to these covenants, that they are void, because they are contracts prohibited by the Donation Act. The second proviso in section 4 is relied on. It reads—“That all future contracts, by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they have received a patent therefor, shall be void.” Waiving the question of whether this prohibition extends to future contracts concerning lands which the covenantor might receive, but which eventually he does not acquire under the act and receive the patent therefor, it is plain that it does not include these covenants which were made *before* the passage of the act. It is a plain case for the application of the familiar rule—the mention of one excludes the other. The prohibition of *future* contracts is a recognition and affirmance of *past* ones; otherwise lawful.

Counsel for the complainant also insists, that independent

James Fields v. Ida Squires.

of the covenants in the deed, Fields is entitled to the relief prayed for. In support of this position counsel cites section 6 of "An act to regulate conveyances," the same being included in "An act to enact and cause to be published a code of laws," passed September 29, 1849, and commonly called "the Steamboat Code." (Laws of 1843-9, 139.) This section was in force at the date of the execution of the deed. It reads: "The words *grant, bargain and sell* in all conveyances, in which any *estate of inheritance, in fee simple*, is limited, shall, unless *restrained by express terms in such conveyance*, be construed to be the following express covenants on the part of the grantor for himself and his heirs, to the grantee, his heirs and assigns." Then follows the specification of the covenants—namely, of seizin of an indefeasible estate in fee simple—against encumbrances, and for further assurance. This section is taken almost literally from the statute of 6 Anne, c. 35, and was first introduced into the United States in the province of Pennsylvania. (Rawle on Cov. 533, 537.)

It is difficult to perceive, how it can be *even* claimed that this deed falls within the operation of this section. It does not contain the words, *grant, bargain and sell*, or either of them, or the equivalent of them, but the very reverse—*release, quitclaim and confirm*. The deed does not assume to pass or limit *an estate of inheritance in fee simple*, but as has been shown only the interest of the grantor, which was then well known to all the parties to be merely the possession. Besides the *express words* in the special covenants restrain the statute and prevent the covenants from attaching. By the language of his covenants the grantor excepts the title of the United States from his warranty and expressly asserts that the title is in the latter, and not himself.

The *habendum*—to have and to hold to him and his heirs and assigns forever, does not affect the question of whether the deed purports to pass an estate of inheritance. These words grant no estate, nor do they enlarge the interest already released by the premises or granting part of the deed. By this clause it is simply declared, that the interest

of the grantor, whatever it is, is released absolutely—forever, and not for a limited time, to be by him thereafter resumed.

This disposes of the case as to the two fifths interest of which Daniel H. died seized. The complainant is entitled to a conveyance of the fifth which Daniel H. obtained from the United States.

But the complainant alleges that he has since acquired three other undivided fifths of this half block by the decree in the partition suit.

As has been shown in the statement of the bill, while the heirs of Daniel H. and the children of Nancy were tenants in common of the *whole* of the west half of the donation, and while such heirs and children and the *grantees* of Daniel H. were tenants in common of certain *parcels* of such half, the Circuit Court made a partition of the whole tract as between those *two* classes—the children of Nancy on the one hand and the heirs and grantees of Daniel H. on the other.

By the decree it was declared that Daniel H. in his lifetime was the owner of two fifths of the whole tract, and that the other three fifths was the property of the children of Nancy. It also appeared that Daniel H. had disposed of certain parcels of the tract. From these premises it followed that the children of Nancy were entitled to three fifths in equal parts, and that the heirs and grantees of Daniel H. were entitled to the other two fifths according to their respective interests, or in other words, that such heirs were entitled to such two fifths, subject to the rights and interests of the prior grantees of Daniel H.

The parcels affected by the contracts and conveyances of Daniel H., being in the aggregate more than two fifths of the tract, the Court, in making partition between the two classes as above stated, was compelled to divide the tract into two unequal portions, and decree compensation in money from the greater to the less to make partition equal.

Thus the greater portion of the tract was allotted to those who represented only the two fifths interest, but for the sake of convenience it may be called the two fifths tract. The lesser

James Fields v. Ida Squires.

portion was allotted to those who represented the three fifths interest, but for the same reason it may be called the three fifths tract. By this decree and allotment the interest of the children of Nancy in the two fifth tract were divested, and also the interest of the heirs of Daniel H. in the three fifth tract. The grantees of Daniel H. had no interest in the three fifth tract. They yielded nothing in the partition and received nothing. The decree left their interests as it found them. The exchange of interests was between the heirs and children. What the latter parted with in the two fifth tract the former received, and what the former parted with in the three fifth tract the latter received.

Here the partition ended. No partition was made of the two fifth tract as between those to whom it was allotted. Nor was it ascertained and determined to whom it belonged, or in what proportions. It is allotted to a *class* of persons known or supposed to exist, to some or all of whom it *must* belong—namely: the heirs, grantees and assignees of Daniel H., who died seized. It is allotted to them according to their *respective* interests, and not in definite quantities, divided or undivided. To the *heirs* the law will give in equal parts all that portion of the tract allotted, not previously disposed of by their ancestor, Daniel H. To the *grantees* or *assignees* of Daniel H., the law will give all those parcels or interests in the tract which by any conveyance or contract binding on the heirs, he disposed of in his lifetime.

But as between these persons, whoever they may be, the determination of these questions is very properly omitted by the decree, and the parties interested must settle them among themselves amicably, or by judicial proceedings, as may be found necessary or deemed best.

Apply this statement of the operation and effect of the decree in the partition suit to the case of the complainant.

Block G is a part of the two fifth tract, and the complainant claims the half of it. By the decree in the partition suit it is in no way ascertained or determined that the complainant is either heir, grantee or assignee of Daniel H., or that he had any interest in the two fifth tract. He brings

James Fields v. Ida Squires.

this suit claiming to be entitled to the half of the block by virtue of the deed and covenants to Chapman, and the subsequent conveyances to himself. He claims under these conveyances, and whatever interest he is entitled to, results from them, and not the decree in partition. As has been shown, the complainant at the time of the decree had an equitable estate in an undivided one fifth of the half block and no more. As to this fifth he is now entitled to a conveyance of the legal title from the heirs of Daniel H., by reason of the covenant in the deed to Chapman, and it may be assumed for the present that he has the legal estate therein.

Prior to and at the date of the partition the other four undivided fifths of the half block belonged—three fifths to the children of Nancy, and the other fifth to the heirs of Daniel H. As has been shown, this three fifths was by the partition vested in the heirs of Daniel H., in consideration of their interest in the two fifth tract being vested in the children of Nancy, and the payment of the owelty deemed necessary to make the partition equal.

The interest of the complainant was not diminished or increased by the decree. The decree left him as it found him, except that it diminished the number of his co-tenants or persons with whom he held in common. Before the decree he was practically the owner of an undivided fifth of the half block, and his co-tenants and owners of the other four fifths were the children of Nancy and the heirs of Daniel H. Since the decree, and by virtue of the decree, the heirs of Daniel H. are the owners of these undivided four fifths, and the complainant is tenant in common with them alone.

It follows that the complainant acquired no further or additional interest in the half block by the partition. The nature or quantity of his interest has never varied or been affected by the partition and exchange between the children and the heirs. He claims under the deed and covenant of Daniel H., and not otherwise. If by these he would have been entitled to the *whole* interest in the half block, as against Daniel H., or his heirs, the decree would have re-

served it for him. But by the deed and covenant he is only entitled to an undivided fifth of the half block, and the decree allotting this half block to the heirs and the complainant according to their *respective interests*, does not nor should not increase or diminish the interest of the latter. His *interest*, as now ascertained, was an undivided fifth, and he cannot take more, except at the expense of the lawful owners—the heirs of Daniel H.

Upon this point, the argument for the complainant is sought to be strengthened by appeals to the fact that he has made valuable improvements, and what is called in the statement of the bill, “the equities in partition.” But certainly this is all irrelevant and beside the matter in controversy. The complainant cannot enlarge his *interest in the land*, by making improvements upon it. This is not a suit for partition. When partition is sought between the complainant and his co-tenants, the heirs of Daniel H., it can be properly considered and determined, to what extent the former may be equitably entitled to have the value of his improvements estimated in his favor in the partition, provided his fifth cannot be set off to him so as to include them. In such suit, equity may also apportion the owelty charged upon the half block, so as to relieve the complainant’s fifth from any part of it, if it should be found proper and equitable to do so.

The complainant to protect his interest from sale, deemed it necessary to pay this owelty, and has paid it. Because, as he alleges, the defendant and her co-heirs suffered and encouraged him to pay the owelty, he claims to have acquired some additional interest in the half block. This claim is without any foundation in law. Whoever deemed it necessary to protect his interests in the land might pay the owelty, but he thereby acquired no right as against the real owner, beyond the right to be re-imbursed the amount paid for the benefit of the latter, with a lien upon the land as security. The decree in this respect, is too plain to be misunderstood. Whoever paid owelty, paid it upon his own judgment, and could not thereby acquire or affect the rights

of others, whether they had notice of it or not. The owelty was not apportioned among the *persons* who owned the two fifth tract, for the same reason that the land was not—the Court did not know or undertake to determine, who the owners were, or what was the relative or absolute proportion or quantity of their interests. The owelty was charged upon the land in gross, and not upon any portion of it or to any particular person. The land remains as a security to any one, who from necessity or misapprehension, may pay beyond the extent of his real interest. But whether a mere volunteer, who confessedly had no interest in the land, could claim this security, may be a question.

As between the heirs and the complainant, it appears to me that no part of the owelty is chargeable upon the complainant's fifth. The cause of and consideration for owelty was the excess in value of the land which the heirs got in the partition, over that which they thereby yielded to the children of Nancy.

In a suit for partition between these parties, the Court, upon this view of the case, ought to apportion the owelty, so as to discharge the complainant's fifth from any part of it, or by some means compel restitution or make compensation, for so much of the sum as has been paid on account of such fifth. This, it appears to me, is what equity would do in a suit for partition between these parties; but the occasion for furnishing this relief to the complainant does not arise in this suit.

This suggestion rests upon general principles, and is equally applicable to any distinct parcel of the two fifth tract, upon which owelty was charged in gross, and which may be owned by the heirs and grantees of Daniel H. in common.

But there is a special circumstance in this case, which, as between the complainant and the heirs, must have the effect or operate to relieve or discharge the complainant's fifth from the owelty. The heirs are bound by the covenant of their ancestor, to convey to the complainant, his undivided fifth as their ancestor obtained it from the United States—

James Fields v. Ida Squires.

free from encumbrances, or respond in damages for the breach of the covenant, so far as they have received assets. The owelty is an encumbrance, suffered during the time of their interest in the land, as heirs, and of which they have received the benefit.

The complainant also claims, that independent of the paper title set forth, there has arisen an equitable estoppel *in pais*, sufficient to bar the rights of the heirs in any part of the premises.

The alleged declarations of Daniel H., and his and the heirs' notice of the complainant's possession and improvements and their acquiescence therein, are relied upon as constituting this estoppel. 2 Am. Lead. Cases, 754, upon the doctrine and effect of license to do some act or enjoy some privilege upon the land of another, is cited in support of this position. The authorities cited have no bearing upon the question; and moreover the facts alleged in the bill, do not show even a license for any purpose.

This is a question of title—ownership of the soil, and not a mere easement or privilege. Titles would not be worth the paper upon which they are written, if they could be called in question or destroyed in this way—by the proof of stale parol declarations inconsistent with or in opposition to them. As to these declarations, the dead cannot answer. If allowed to be shown, in bar of the acknowledged title of the ancestor, the heirs would hold their property upon the insecure tenure of the testimony of interested witnesses and claimants, as to matters resting only in parol, which if false or exaggerated, are incapable at this late day of either contradiction or explanation. This would be to offer a bounty for frauds and perjuries, instead of preventing them as the Statute of Frauds commands and intends.

In 1852, when complainant purchased from Dobleblower, this land belonged to Nancy. She was then living, and to whom it would go upon her death was not known to any one. She had the power of disposing of it by will. If she died intestate, and before patent, and Daniel H. survived her, he would be entitled to a certain interest in it, depend-

ing upon the number of children she left living. But at that time Daniel H. had no interest. Under these circumstances, he is said to have assured the complainant that *the title* was good, and thereupon the latter purchased of Doubleblower. Waiving the question of *what* title is referred to by this ambiguous expression—whether it be that of Doubleblower, Chapman, Daniel H., or Nancy, this assurance amounts to nothing more than the expression of an opinion by a stranger—a person who had then no interest in the land and could not know that he ever would have. This expression of opinion as to the existing title—that it was good—could not create an estoppel against Daniel H. as to a subsequently acquired estate in the land. No special relation, implying trust and confidence, is shown or pretended to have existed between these parties. Daniel H. was not the guardian or attorney of the complainant. No misrepresentation of *facts* or concealment of them or fraudulent purpose is imputed to Daniel H. The complainant had the same means of knowing the state of the title that Daniel H. had. The latter is not responsible to the former for the correctness of his opinions about the title, even if these opinions influenced the complainant to make the purchase—which is extremely doubtful, even upon the face of the bill. So far as Daniel H.'s opinions resulted in written acts—his deed and covenant—he is responsible, and no further. If the complainant proposed to purchase upon the opinion of another as to *the title*, he should have taken the advice of counsel, and not Daniel H. Of course the subsequent repetitions of this assurance by Daniel H. do not vary the effect of the first one. Moreover, they are perfectly immaterial in any view of the matter, as the purchase was made before they were uttered, and could not have been influenced by them.

As to the other branch of this alleged equitable estoppel—the possession and improvements of the complainant—the case is equally clear against the complainant.

During the tenure of Nancy in the land she was a married woman, and the complainant could not acquire any rights as

James Fields v. Ida Squires.

against her, on account of her silence as to his occupation and improvements, whether she had notice of them or not. And if this were otherwise, the land did not *descend* from her, so as to be bound for her acts or omissions, in the hands of Daniel H. and the children. *Her estate* in the land terminated with her death, as well as her *enjoyment* of it. Thereafter a new estate in the land commenced in Daniel H. and the children, which they took directly from the United States. During the lifetime of Nancy, Daniel H. and the children had no interest in the land, and could not be affected by notice of possession and improvements, more than any other stranger. After the death of Nancy, they became the owners of the land, and were capable—except those who were minors—of affecting their interests by their acts and doings, so far as the law allows them to be sufficient for that purpose.

But the whole idea upon which this branch of the case rests is a novelty and without authority of law. It is, that the complainant could acquire the title to this property as against the lawful owners, by being in possession and improving it, to their knowledge, for a less period than that prescribed by the Statute of Limitations. Mere possession, unless it be adverse and continued for twenty years, does not give *title* as against the owner. Possession is evidence of title, and sufficient evidence, in the absence of better. But here the title is shown beyond a doubt to have been in the defendant and those under whom she claims, all the period of the complainant's possession, since the death of Nancy.

The possession of the complainant, if adverse, might ripen into title by lapse of time, and in such case it would be immaterial whether any one had notice of it or not. For the same reason, if sufficient time had not elapsed to work a transfer of the estate by reason of the possession, the owner's right is not affected by the possession, however distinctly he had notice of it. As was said in *Chapman v. School District No. 1 et al.*, (Ante 108:) "The owner of real property may rest upon his title, and is not required to be always upon the premises, asserting his title, as against the

James Fields v. Ida Squires.

world or any less number of persons, whom he may permit or suffer from time to time, to be in the temporary occupancy or enjoyment of it."

Admitting then, for the present, that the complainant was in the adverse possession, and that Daniel H. had notice thereof from the time he became owner of the land, it in no way benefits the complainant. 'It was the business of complainant to know whether he was upon his own land or that of another.

But it is apparent and undeniable that the complainant's possession continued as it commenced, under the deed to Chapman and the mesne conveyances of Chapman to Doubleblower, and the latter to himself. By force of these, upon the death of Nancy, he became equitably entitled to an undivided fifth. Thereafter he was tenant in common with Daniel H. in his lifetime and his heirs since. His possession was not adverse to their title or right, but consistent with, and would not in any length of time affect their interest in the land. Tenancies in common would be dangerous tenures, if one tenant could occupy and improve the other out of his estate—particularly if that other was a minor, resident in another State.

It is also alleged that Daniel H. had notice of the complainant's possession when he purchased the fifth of Isabella Ellen, and, therefore, he and his heirs are estopped from asserting their title to such interest. How this can be, I cannot see. Daniel H.'s purchase of this interest, worked no wrong to the complainant. It was Isabella Ellen's property, and complainant, as against her, had no claim to it, either at law or in equity. She had an undoubted right to dispose of it, and Daniel H. to purchase it. If the complainant being in possession, did not prevent her from selling, as it did not, it did not prevent Daniel H. from purchasing. If Isabella Ellen, had agreed by a valid contract to sell this fifth to the complainant, or had for any other reason been bound in equity to convey it to him, and Daniel H. had interfered and obtained the conveyance first, with notice of the complainant's possession, then, this matter of

Joshua Hendy v. Frank Soule.

notice would be material. But as it was, it amounts to nothing. If one tenant in common cannot dispose of his interest to a person who has notice of his co-tenant's possession, estates in common would often be inalienable.

This, I believe, disposes of all the material questions raised and argued by counsel on the demurrer.

The demurrer is overruled, at the costs of the defendant, and unless leave is given to answer, there must be a decree for the complainant, that the defendant, by a proper conveyance with covenants of warranty, release to the complainant, her interest in the undivided fifth of the premises, which her ancestor obtained from the United States, and which she inherited from him.

W. W. Chapman, for complainant.

W. W. Page and *W. Lair Hill*, for defendant.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT
OF CALIFORNIA.

CIRCUIT COURT, MARCH 15, 1868.

JOSHUA HENDY v. FRANK SOULE.

Section 19 of the act of July 13, 1866 (14 Stat. 152), declared that no suit should be maintained for the recovery of any tax illegally assessed or collected until after an appeal to the Commissioner of internal revenue: *Held*, that in an action against a collector to recover a tax alleged to have been so assessed and collected, a failure by the plaintiff to take such appeal must be pleaded by the defendant in abatement of the action, and unless it is, he will be deemed to have waived the objection.

When taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property to make the payment involuntary.

The plaintiff was the owner of a patent for the exclusive manufacture and sale of a certain "*Concentrator*," and employed others to construct the machines for him at so much a piece, and then sold them at about 100 per centum advance on the price paid for their construction: *Held*, that under sections 79 and 86 of the act of July 13, 1866 (14 Stat. 119, 122), the plaintiff was the manufacturer of such machines and liable for a tax upon the sum realized by the sale of them.

Joshua Hendy v. Frank Soule.

DEADY, J. This action is brought against the defendant, as Collector of the Internal Revenue for the First District of California. It was commenced in the Twelfth District Court of the State, and removed to this Court on the application of defendant. The cause was tried upon the amended complaint, filed in this Court, and the answer of the defendant, without a jury. The object of the action is to recover from the defendant the sum of \$329.10, paid to him for a manufacturer's license and as a manufacturer's tax.

From the evidence and the admissions in the pleadings, it appears that the plaintiff was the owner of a patent right for the manufacture and sale of "Hendy's Patent Concentrator." The plaintiff employed certain foundrymen to construct a number of those machines for him, for which he paid them from \$125 to \$150 apiece. The foundrymen had a manufacturer's license, and paid the manufacturer's tax upon the money which they received from the plaintiff for constructing the machines. The contractors constructed these machines exclusively for the plaintiff, and were not authorized to sell any of them, except in pursuance of his special directions. The plaintiff kept the machines for sale, and sold them at \$250 and \$300 apiece—about one hundred per centum more than the cost of construction.

The assessor of the district assessed the plaintiff for a manufacturer's license and with the manufacturer's tax upon the sums received by him from the sale of machines, over and above the cost of construction. In the course of his official business, these assessments were collected from the plaintiff by the defendant—the former paying the sum under protest, and after the issuing and exhibition to him of a warrant to distrain his property for the same.

This is the case. But before considering it upon its merits, it is proper to refer to the provision in section 19 of the act of July 13, 1866 (14 Stat. 152), which enacts as follows:

"That no suit shall be maintained in any Court for the recovery of any tax, alleged to have been erroneously or

Joshua Hendy v. Frank Soule.

illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue."

No notice is taken of this provision, in either the pleadings or the argument.

Does the statute operate to prevent the jurisdiction of the Court, unless the complaint shows that an appeal has been taken? or does it merely furnish a defence to the action, which the defendant, as his personal privilege, may plead and insist upon, or waive by his silence?

By the Statute of Limitation, it is declared that an action shall not be maintained, upon certain causes of action, unless commenced within a specified time. But this statute was never held to affect the jurisdiction of the Court, and the defendant, to obtain the benefit of it, must set up and insist upon the bar. In my judgment the cases are parallel. This statute should not be construed to limit the jurisdiction of the Court, but as a qualified restraint upon the general right of the plaintiff to maintain an action "for the recovery of a tax erroneously or illegally assessed or collected." The right of action exists in favor of the party injured by the collection of the tax, independent of the statute. The statute, to save the Government, now represented by the defendant, the trouble and expense of unnecessary litigation, requires the plaintiff to first present his claim for relief, by appeal, to the Commissioner.

In this view of the matter, it is not necessary to the maintenance of the action, for the complainant to show that an appeal has been made to the Commissioner. If no appeal has been made, the defendant may protect himself, by plea to that effect, in abatement of the action, or he may by his silence waive this defence, and then it becomes immaterial whether an appeal was made to the Commissioner or not.

The defendant in his answer avers that the plaintiff paid these taxes voluntarily, and therefore is not entitled to recover them back, even if they were illegally assessed. But the proof establishes the contrary. The taxes were demanded by an officer having authority to collect them by distraint—without action. That is sufficient duress of the

Joshua Hendy v. Frank Soule.

plaintiff's property, to make the payment involuntary. (*Mari-
posa Co. v. Bowman*, Ante, 228.)

If then, the plaintiff was not the manufacturer of these machines, he is entitled to judgment for the amount claimed.

For the purpose of indicating who are required to take out a manufacturer's license, a manufacturer is defined by the act of July 13, 1866 (14 Stat. 119), as follows:

"Any person, firm, or corporation, who shall manufacture, by hand or machinery, any goods, wares, or merchandise, not otherwise provided for, exceeding annually the sum of one thousand dollars, or who shall be engaged in the manufacture, or preparation for sale, of any article or compound, * * * shall be regarded as a manufacturer."

By the same act (14 Stat. 122), it is provided that the manufacturers shall pay a certain tax *ad valorem* upon "goods, wares and merchandise" therein mentioned, "produced and sold or manufactured, or made and sold * * * within the United States;" and that the "return of the value and quantity" of goods, etc., manufactured, shall contain "an account of the full amount of actual sales made by the manufacturer or producer," and that the "value and quantity of the goods, etc., shall be estimated by the actual sales made by the manufacturer."

The tax is not imposed upon goods manufactured merely, but upon goods manufactured and sold or removed for consumption, etc. The tax imposed upon the manufacture of these machines was *ad valorem*—a per centum of their market value—the sum received for them on actual sales.

From these premises it is evident that the tax imposed upon the manufacturer of these machines, should have been assessed upon the amount for which they sold, and not the mere cost of construction. Who is liable for it? To whom should the assessment be made? the plaintiff or the mechanics who constructed the machines? The Government is entitled to the tax, and one or the other of them must pay it. Justice at once suggests that the person who sold the

Joshua Hendy v. Frank Soule.

machines and received the money arising from the actual sales, should pay the tax. This is the plaintiff. Besides, the plaintiff comes exactly within the latter clause of the definition of a manufacturer, in the act already cited. He is a person engaged in the manufacture or preparation of these machines for sale. To be engaged in the manufacture of machines, it is not necessary that a person should make them with his own hands, or that the work should progress under his personal inspection. Properly speaking, the plaintiff should have been assessed with the whole value of the machines, but the omission to do so, is no reason why he should not have paid what he did. The persons who constructed these machines for the plaintiff, did not manufacture them for sale, or sell them—they simply made them as workmen for wages or hire.

The plaintiff, on the other hand, was engaged in the manufacture of the machines for sale, and sold them. In his hands, their value consisted of the cost of production, and the price he could induce the public to give in addition, rather than do without them, as his patent gave him a monopoly of the article.

The plaintiff is within the statute definition of a manufacturer, and therefore liable to pay the license tax. He is the manufacturer also of these machines, and ought to pay a tax upon the sum realized by the sale of them. It can make no difference that fifty per cent. of this value arises from the fact that the plaintiff has a monopoly of this production. Like causes or the exact converse enter into and modify the market price of all articles of manufacture. The tax is imposed upon the result—the price obtained—be it more or less, from whatever cause. The greater the sum realized the greater the tax, and *vice versa*.

The plaintiff might employ all the manufacturers or producers of a particular article, in this community, to work for him for a given period. By this means he might control the market so as to command a large price for his goods. But if so, he is taxed accordingly. In other words, it is immaterial what conduces to give an article its market value.

John Parrott v. D. N. Barney.

Whatever that value is, the tax must be imposed upon that basis.

Judgment must be given for the defendant.

Elisha Cook, for plaintiff.

R. F. Morrison, for defendant.

CIRCUIT COURT, MARCH 31, 1868.

JOHN PARROTT v. D. N. BARNEY *et al.*

Where a demurrer is taken to the *complaint*, if either count therein is good, it must be overruled.

The statutes of Marlebridge and Gloucester concerning waste are a part of the common law, brought to this country by the colonists from England.

The Statute of California (Prac. Act, § 250), which gives an action to the person aggrieved against a tenant who may *commit* waste, includes *permissive* waste.

If a tenant at will commit voluntary waste he is liable not as a tenant but as a trespasser, but for mere permissive waste—a neglect to keep the premises in repair—he is not liable.

A tenancy from year to year is not a tenancy at *will*, but for a *term*—a prescribed and certain time.

When waste is committed by a stranger during the term of the tenant, an action on the case may be maintained therefor, either against the tenant who suffered the waste or the stranger who committed it.

An allegation that the defendants held certain premises as tenants thereof to the plaintiffs under a demise to them for a certain rent, imports a tenancy for a term.

DEADY, J. This action was commenced on March 20, 1867, in the Twelfth District Court of the State. On August 21, 1867, the defendants appeared to the action by attorney and petitioned to have the cause removed to this Court. On September 21, 1867, the State Court made an order allowing the petition for removal.

The action has been tried in this Court upon the complaint of the plaintiff and the demurrer of the defendants thereto.

The complaint contains three counts: From the first count, it appears that on April 16, 1866, the plaintiff was the owner

John Parrott v. D. N. Barney.

in fee of certain premises in the city of San Francisco, at the corner of Montgomery and California streets, and that the defendants then occupied and possessed certain portions of said premises, under the plaintiff, "as his tenants thereof from year to year at and under a certain yearly rent"—the reversion thereof being in the plaintiff.

That the defendants, during such occupation and possession, at the date aforesaid, "by themselves and their servants, carelessly, negligently, improperly and improvidently introduced and caused and procured to be introduced, and suffered and permitted to be introduced" into the premises certain explosive substances, which, by themselves and servants they so carelessly, negligently, etc., handled, managed, etc., "that the same then and there exploded with great force and violence, and then and there by means and force of the said explosion, broke down, wasted and destroyed divers," etc., "being parcel of the freehold of the said premises so held by them, the said defendants," of the value of \$20,000, to the waste and injury of the reversion of the plaintiff and his damage, \$20,000, and "against the form of the statute in such case made and provided."

The second count alleges that a certain portion of the premises above mentioned, at the date aforesaid, were in the occupation and possession of Gerrit W. Bell and the Union Club, as tenants of the plaintiff's from month to month, the reversion thereof being in the plaintiff; and that the defendants doing business as aforesaid, in premises in the immediate vicinity of those occupied by Bell and the Union Club, caused and suffered the explosion above mentioned to take place, by means whereof, there was broken down, wasted and destroyed, divers, etc., being parcel of the freehold of the said premises, occupied by Bell and the Union Club, of the value of \$30,000, to the waste and injury of the reversion of the plaintiff, and his damage \$30,000.

The third count alleges that a certain portion of the premises was held and occupied by the defendants, at the date aforesaid, as tenants thereof to the plaintiff, under a certain

John Parrott v. D. N. Barney.

demise and rent, and that Gerrit W. Bell and the Union Club, occupied a certain other portion of the premises as tenants of the plaintiff, the reversion thereof being in the plaintiff; and that the defendants, while occupying the premises aforesaid, caused and suffered the explosion above mentioned to take place, by means whereof there was wasted and destroyed divers, etc., portions of the premises, to the injury of the reversion of the plaintiff, \$50,000.

The complaint concludes with a prayer for treble damages upon the first count, and single damages upon the others—in all \$100,000.

The demurrer is taken “to the *complaint*,” and not any particular part of it. The *causes* of demurrer assigned, are the same as to each count: that it does not state facts sufficient to constitute a cause of action.

If either count in the complaint is sufficient, the demurrer being to the whole must be overruled. (1 Chit. Plead. 664, and note; *Weaver v. Conger*, 10 Cal. 237.)

It seems that by the *ancient* common law, tenants were not liable to an action for waste, except those who were in by operation of law—as tenant in dower or guardian in chivalry. To protect the inheritance against the waste of tenants in, by act of the parties, whether for life or years, the Statute of Marlebridge was passed. (52 Hen. III., c. 23, Year 1267.) This statute provided: “Also fermers during their terms shall not make waste, sale or exile of house, woods and men, nor of anything belonging to the tenements, that they have to ferm, without special license had by writing of covenant making mention that they may do it; which thing if they do and thereof be convict, they shall yield full damages and shall be punished by amerciament.” (Chit. Stat., vol. 1, pt. 1, 3.)

This statute proving insufficient, the statute of Gloucester was passed. (6 Edward I., c. 5, Year 1278.) This statute provided: “That a man from henceforth shall have a writ of waste in the chancery against him that holdeth by the law of England, or otherwise, for term of life or for term of years or a woman in dower; and he which shall be attained

John Parrott v. D. N. Barney.

of waste shall leese the thing that he hath wasted, and more-over shall recompense thrice so much as the waste shall be taxed at," etc. (Chit. Stat., vol. 1, pt. 2, 1106.)

These ancient statutes are a part of the common law, brought to this country by the colonists from England. When the migration to America began, they had been in force in the mother country for four centuries, and were then practically as much a part of the English common law as the oldest traditions of the courts. (*Com. v. Knowlton*, 2 Mass. 534; *Sackett v. Sackett*, 8 Pick. 314; 4 Kent's Com. 81.)

These statutes were construed to comprehend *permissive* as well as *commissive* waste. To *do* or *make* waste in a legal sense includes *negligent* as well as voluntary waste. The words "shall not make waste," are construed as a prohibition to *suffer* waste. An averment that waste was *committed* is supported by proof of *negligence* from which waste ensued. (10 Bac. Ab. 421-2; 4 Kent's Com. 82; 2 Black. Com. 283; 2 Saunders, 252; *Robinson v. Wheeler*, 25 N. Y. 259.)

In this State and at this day the remedy and compensation for waste are prescribed by the Practice Act (§ 250). It reads:

"If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, *commit* waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there *may* be judgment for triple damages.

For the defendants it is argued that this section does not include *permissive* waste—the waste set forth in this complaint. The argument presumes that the phrase *commit waste* must be taken in its narrowest literal signification, and that merely *permitting* waste, or suffering it to occur, does not bring a tenant within the statute.

The California statute is a substantial condensation and enactment of sections 1, 2, 3 and 4 of the New York Revised Statutes. (2 Rev. Stat. 334.)

These sections of the revised statutes are a substantial copy of the statutes of Marlebridge and Gloucester, including

John Parrott v. D. N. Barney.

the subsequent one of 13 Edward I., c. 22, which made joint tenant or tenant in common liable to his co-tenant for waste.

The New York statute of waste, like its English prototype, was construed to include permissive waste. (*Cook v. The Champlain Transportation Co.*, 1 Denio, 104; *Robinson v. Wheeler*, 25 N. Y. 259.) This California statute must receive the same construction as the English and New York. In enacting the former, it must be presumed that the legislature intended to adopt as a part of it, the current and long established construction of the latter. The statutes all use the same language: "shall not *make* waste"—(Marlebridge) "be attainted of waste shall leese the thing that *he hath wasted*," (Glocester)—"shall *commit* waste" (N. Y. Rev-Stat.)—"commit waste" (Cal. Stat).

The cases cited by counsel for defendant (*Torriano et al. v. Young*, 6 Car. and Payne, 8; *Gibson v. Wells*, 1 Bosanquet and Puller, 290; Holt's Ni. Pri. 7), only go to show that at that time the action on the case was not considered a *proper remedy* for permissive waste. They do not decide that tenant for years was not *liable* for permissive waste. The action on the case had then almost superseded the writ of waste for commissive waste, but as to permissive waste it was thought by some courts and judges that *case* would not lie.

Here the distinction between common law actions is abolished, and the ancient writ of waste was never known. The statute declares who shall be liable for waste, and to whom. It also prescribes the remedy and the measure of damages. This remedy is an action against the tenant—practically an action on the case—the circumstances. The action or remedy given is as broad as the statute, and may be maintained by the party aggrieved against the tenant for either commissive or permissive waste. What constitutes waste, the statutes has left to the courts and the common law to determine.

The first count alleges a tenancy from year to year. Counsel for the defendants insist that this allegation only amounts

John Parrott v. D. N. Barney.

to an averment of a tenancy at will, and that, therefore, defendants are not within the statute and not liable for waste. If tenant at will commit voluntary waste, he is not liable as a tenant, but as a trespasser for a trespass. The act of waste being inconsistent with such a tenure, it determines the tenancy or estate, and the tenant is deemed a trespasser. For *mere* permissive waste—a neglect or failure to keep the premises in repair—a tenant at will was never liable. His time in the premises is too uncertain for the law to impose that burden or duty upon him.

The waste complained of in this count, is in one sense, and it may be the only sense, permissive. It was not intentional. Yet it was the direct and immediate result of the positive act of the tenants, and I am not prepared to admit that they are not liable for it as trespassers, even if they were merely tenants at will. But I am satisfied, upon both reason and authority, that the tenancy described in this count is a tenancy for years. All that is necessary to constitute a tenant for years, is, that he have a certain time in the premises, be it for a day or a thousand years. A tenancy from year to year is a tenancy for a definite recurring period, and not at will.

During each of such periods it is a tenancy for the time or term of one year. How often it may be renewed and how long continued by such renewal, depends upon the future conduct of the parties, and is, therefore, uncertain. But for the current year—in this case the year of the alleged explosion and waste—these tenants held the premises independent of the will of their landlord.

They had a *term*—a prescribed and certain time in the tenements. They were termors—tenants for a term—a time certain, and not at will. (10 Bac. Ab. 446; 4 Kent's Com. 111-117; 2 Black. Com. 147, n. 12 and 13.)

The defendants being tenants for a year, are within the statute giving the action for waste, and are, therefore, liable to the person aggrieved for waste done or suffered by them during their term.

As to waste arising from non-repair merely, the liability

John Parrott v. D. N. Baruey.

of tenant for years would materially depend upon the duration of his term. Between a tenant for a term of one hundred years and one year, I think there should be a marked difference in this respect. But a tenant for one year or one day ought to be liable for waste which results directly from his negligent or unskillful manner of using the property. In the one case the tenant is merely passive, but in the other, in doing a lawful act, without lawful care or skill, he causes affirmative and positive injury to the premises. For instance, a tenant for a term of one year negligently leaves the orchard gate open, so that the beasts of the field enter and destroy the trees, or in conducting water to the garden he negligently or unskillfully allows the stream to undermine the dwelling-house, so as to overthrow it. Technically speaking, this may be what the books call permissive waste—I suppose it is. The result was not intended, but produced by negligence or want of skill. Yet a tenant ought to be liable for such waste without reference to the length or duration of his term. Because it is produced not by a failure to repair, but by positive misconduct. The first count is sufficient, and the demurrer being taken to the whole complaint, must therefore be overruled.

But, in my judgment, the second and third counts are also good.

The second count is simply an action on the case by one who has the inheritance against a stranger, for waste on the demised premises during the term. It having been shown in the consideration of the first count, that the injuries complained of amounted to waste, for which the tenants were liable to the landlords, whether committed by themselves or others, it follows that the action can be maintained by the landlord, against either the tenant who suffered the waste or the stranger who committed or caused it. (6 Con. 328; *Short v. Wilson*, 13 John. 37; *Attersol v. Stevens*, 1 Taunton, 198.)

The special objection to the third count is, that the tenancy is not sufficiently alleged. The allegation is substantially, that the defendants held certain portions of the

John Parrott v. D. N. Barney.

premises as tenants thereof to the plaintiff, under a demise to them, and for a certain rent. The allegation is an unqualified averment that there was a lease to the defendants for a certain rent, payable to the plaintiff, who had the inheritance and immediate reversion. True, it does not affirmatively appear that the lease was for a term of years, and it *may* have been at will. But the most reasonable conclusion is, that the allegation imports a tenancy for a term. (*Robinson v. Wheeler*, 25 N. Y. 263.)

In the course of the oral argument upon the demurrer, the prayer of the complaint was criticised. In passing upon the demurrer I have paid no attention to the prayer of the complaint. In a common law action the demand for relief is a mere matter of form, except it be considered in the light of a proposition to the adverse party. What relief the plaintiff is entitled to, will depend upon the facts stated and the law arising thereon, and not the prayer. Upon this complaint, the plaintiff being entitled to recover something, must have damages commensurate with the injury which the proof may show that he has sustained in consequence of the waste. An action for waste cannot be maintained unless authorized by the statute. The Court will take notice of the statute, and the complaint need not notice it or conclude against the form of it. A verdict for the plaintiff should, as in ordinary actions for tort, be for the amount of damage actually sustained. The judgment of the Court, by authority of the statute, *may* be given for treble that sum, or not, depending upon the circumstances of aggravation or mitigation that attended the commission of the waste.

John Doyle, for plaintiff.

Eugene Casserly, for defendants.

William H. Howland v. Frank Soule.

CIRCUIT COURT, APRIL 16, 1868.

**WILLIAM H. HOWLAND, HORACE B. ANGELL, IRWIN
T. KING AND CYRUS PALMER v. FRANK SOULE.**

Section 10 of the act of March 2, 1867 (14 Stat. 152), amends section 19 of the act of July 13, 1866 (14 Stat. 475), by adding thereto as follows: "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any Court:" *Held*, that this prohibition included a suit to restrain the collection of any sum by authority of the United States, having the form and color of a tax, by any means authorized by law for the collection of taxes.

DEADY, J. The complainants are the proprietors of the Miners' Foundry, in San Francisco. The defendant is the Collector of Internal Revenue for this district. From September, 1862, until October, 1865, the complainants, as manufacturers, made monthly returns, and paid the taxes levied upon such returns. About October 1, 1865, the assessor for the district went upon the premises of the complainants, and upon an examination of their books and materials, determined that their returns, anterior to that time, were false; and thereupon said assessor made a reassessment of their manufactures for the period between September, 1862, and October, 1865. The taxes levied upon this assessment, and the penalties for the prior fraudulent returns (amounting in round numbers to \$20,000), were delivered to the defendant for collection. The defendant gave notice to the complainants that unless the amount was paid, he should proceed to collect the same by distraint of their property as provided by law.

On October 10, 1867, the complainants commenced this suit in the Fourth District Court of the State, to enjoin the defendant from collecting the tax by distraint. On petition to this Court by defendant, the cause was removed here—October 14, 1867—by *certiorari*. In the meantime a preliminary injunction was allowed in the State Court, which injunction was subsequently continued in this Court, by order of the District Judge.

William H. Howland v. Frank Soule.

The cause has been heard on bill and answer, by consent of parties.

The complaint alleges that the returns of the complainants were correct and accepted by the assistant assessor then in office and authorized to receive the same; and also that the question of their correctness has been adjudicated in an action by the United States against the complainants for sundry penalties, alleged to have been incurred by complainants, on account of the incorrectness of such returns.

The answer denies the correctness of the returns, and avers that they were false and fraudulent; and also that the additional assessment was correct and made in pursuance of law. For the purposes of the hearing, the answer is taken to be true.

In the course of the argument various questions were discussed by counsel which I do not deem necessary to consider.

By section 10 of the Act of March 2, 1867 (14 Stat., 152), section 19 of the act of July 13, 1866 (14 Stat. 475), is amended by adding thereto as follows:

“And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any Court.”

In my judgment this clause prohibits the maintenance of this suit. I cannot see how it can be otherwise construed.

Counsel for the complainants admits the statute and its validity, but seeks to avoid its application to this case. His argument is twofold, and may be briefly stated thus:

I. This is an illegal tax, and therefore *no* tax. A suit to enjoin the collection of this demand is therefore not a suit to restrain the collection of a tax.

II. This suit is not brought to restrain the collection of a tax, but only to prevent its collection by force—without action—by distraint.

Admitting that a Court might determine this tax to be illegal or erroneous, it does not follow that a suit to restrain its collection is not within the prohibition of the statute. The object of the statute is to prevent the assessment and collection of the public revenue from being hindered or de-

William H. Howland v. Frank Soule.

layed by judicial proceedings, at the instigation and upon the representation of parties interested to avoid or resist the payment of taxes. The statute would be wholly inadequate to that object, if *such* parties were allowed to maintain suits to enjoin the collection of a tax, because, as *they say*, the proceedings in the Revenue Department were erroneous or illegal.

A person not pleased with a tax will readily conclude that it is illegal or erroneous, and a suit for injunction follows. His neighbor soon catches the infection, and the result would be that the wheels of Government would be stopped by injunction and revenue would cease to flow into its treasury. "To *tax* and to *please*, no more than to love and be wise, is not given to man."

The statute prohibits all suits to enjoin the collection of a tax, and leaves the person who considers himself aggrieved by the collection thereof to the ordinary and usual remedy—an action at law to recover back the amount paid.

This is a tax within the meaning of the statute. It has the form and color of a tax. It was assessed upon manufactured articles liable to a duty, by a person in office and clothed with authority over the subject matter. The tax has come to the defendant for collection, in due course of office and from the proper authority. The defendant is the person authorized to collect such taxes, and by the means proposed—the seizure and sale of the complainants' property.

As to the second branch of the argument for the complainants, little need be said. The mere statement of it, appears to me, to be a sufficient refutation of it. It assumes that to prevent the defendant from using the specific means provided by law for the collection of a delinquent tax, is not restraining the collection of that tax. The defendant is not authorized to collect the tax by action except in special cases upon the express directions of the Revenue Bureau.

But if it was entirely optional with the defendant, whether to collect by distraint or suit, to enjoin him in the use of either would be contrary to the manifest spirit and purpose of this statute.

In re Robert A. Sutherland.

There must be a decree dismissing the bill and for costs and expenses.

George Turner, for complainant.

R. F. Morrison, for defendant.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT
OF OREGON.

DISTRICT COURT, MAY 23, 1868.

In re ROBERT A. SUTHERLAND.

A judgment for a fine is not a debt provable in bankruptcy.

DEADY J. From the certificate of the register it appears that the State of Oregon proved a debt against the estate of the bankrupt, amounting to \$1,394.46. Upon the motion of the assignee, the claim has been set down for examination before the Court.

From the evidence and admissions of the counsel for the State and assignee, it appears that on December 3 and 4, 1861, two several judgments were given in the Circuit Court of the State for the county of Multnomah, sentencing the bankrupt to pay two certain fines, and that he be committed until the same be paid. The debt proved before the register is a part of the sum for which these judgments were given, the remainder having been paid.

It is also understood from the admission of counsel that these fines were imposed upon the bankrupt as a punishment prescribed by law for the commission of a crime, of which he had been duly convicted. Indeed a judgment that a party pay a fine, in the absence of anything to the contrary, must be presumed to have been given as a punishment for the commission of a crime.

Section 15 of the act of January 25, 1854 (Or. Laws, 1854, p. 473), in force when these judgments were given, provides that "any convict" confined in jail "for the non-

In re Robert A. Sutherland.

payment of a fine," may be discharged from such imprisonment by the commissioners of the county, if he is unable to pay the fine; "but such convict shall not thereby be released from the payment of such fine, but the same may be collected by execution at any future time." Under this act the bankrupt was discharged from imprisonment soon after the judgments were given.

Section 19 of the Bankrupt Act declares, "That all *debts* due and payable from the bankrupt at the time of the adjudication of bankruptcy, * * * may be proved against the estate of the bankrupt." Does the term *debt* include a judgment for a fine? 3 Black Com. 154, says: "the legal acceptance of *debt* is a sum of money due by certain and express agreement." This, however, is not the popular acceptance of the word. In *Gray v. Bennett* (3 Met. 526) the Court say: "The word debt is of large import, including not only debts of record, or judgments, and debts of specialty, but also obligations under simple contracts to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise." This view of the subject was approved by Justice Story. (*Carver v. Braintrue Man. Co.*, 2 Story, 447.)

To ascertain, then, whether the word debt is here used in the legal or popular sense, recourse must be had to the subject matter and the context. Immediately following the general clause of section 19, concerning debts, as above quoted, it is provided, that, "All demands against the bankrupt for, or on account of, any goods or chattels wrongfully taken, converted or withheld by him may be proved or allowed as debts, to the amount of the value of the property so taken or withheld, with interest." The section then proceeds to provide for the case of contingent debts and liabilities, as well as unliquidated damages upon a contract or promise, and then concludes: "No debts other than those above specified, shall be proved or allowed against the estate."

From all the provisions of the section it is apparent that the word debt is used in the legal or limited sense. If it

In re Robert A. Sutherland.

were used in the popular sense it would not have been necessary to have specially provided that "demands for goods wrongfully taken, etc., may be proved or allowed as debts." In the popular sense such demands are debts, and would have been included in the preceding clause providing for the proving "all debts."

A discharge in bankruptcy releases the bankrupt from all debts which were or might have been proved against his estate. (B. Act. § 34). These fines were imposed upon the bankrupt as a punishment for crimes of which he was convicted. If provable against his estate, he may be discharged from the payment of them, and from arrest made to enforce such payment.

In effect, this would be allowing the National Government, through its Courts, to grant pardons for crimes committed against the State. A person convicted of manslaughter, and sentenced to pay a fine of a thousand dollars, by a discharge in bankruptcy, would be relieved from the punishment affixed by law to his crime. I do not think, that the act while it reasonably admits of any other construction, ought to be construed so as to permit or allow such a consequence.

Looking at the letter of the act, or the nature of the subject, either separately or conjunctively it appears to me, that a judgment for a fine, imposed as a punishment for a crime, is not a debt provable against the estate of the bankrupt. Abstractedly considered, it may be proper that such a judgment should be proved as a debt against the estate for the purpose of receiving any dividend as a part payment thereof, without effecting a full discharge of the same. Such a provision is found in section 33, concerning debts created by fraud or embezzlement, or by defalcation, while acting as a public officer, or in a fiduciary character. But judgments for fines are not included in this special provision, because not enumerated in it.

In the *People v. Spalding* (10 Paige Ch. 284), it was decided that a discharge under the Bankrupt Act of 1841, did not discharge a party from a judgment for a fine imposed

In re Robert A. Sutherland.

upon him as a punishment for a contempt, committed by violating an injunction. The contempt was merely constructive, and the fine imposed was directed by statute to be ultimately applied in satisfaction of the civil injury to the party who obtained the injunction. The Court of Errors affirmed the decision. (7 Hill. 301.) On error to the Supreme Court of the United States, the judgment of the Court of Errors was affirmed. (4 How. 21.)

This case seems decisive of the question. Indeed it goes much farther than the Court is required to go in this case. The Bankrupt Act of 1841, in the use of the word *debt* is much less qualified, than the present one, yet the Court held that it did not include a judgment for a fine. In the case under consideration, the fine was imposed, purely as a punishment for the commission of an actual crime, while in the case cited, the fine was imposed, nominally as a punishment, but in reality as a compensation to the creditor for the civil injury he sustained by reason of the commission of the acts constituting the contempt.

The claim must be expunged from the list of debts proved against the estate of the bankrupt.

M. W. Fechheimer, for the assignee.

M. F. Mulkey, for the State.

The Live Yankee.

DISTRICT COURT, JUNE 20, 1868.

THE LIVE YANKEE.

A common carrier gave a receipt for two casks of wine, received in good order, and agreed to deliver them in like condition at the end of the voyage, the dangers of navigation excepted; in a suit by the shipper for the non-delivery of the goods, the carrier claimed that the wine was lost on the voyage on account of the dangers of navigation and insufficiency of the casks; *Held*, that the burden of proof is upon the carrier to show that the loss arose from the insufficiency of the casks or the dangers of navigation; and that, if upon the whole proof it was doubtful whether the loss arose from either of such causes, the shipper must recover.

DEADY, J. On April 20, 1868, Levi Millard and William J. Van Schuyver, merchants and partners in the city of Portland, filed their libel against the barque Live Yankee, then lying in the port of Portland on Wallamet.

The libel alleges that the libellants on or about October 1, 1867, shipped on The Live Yankee, at the port of San Francisco, California, and bound for the port of Portland, among other goods, two $\frac{3}{4}$ casks of wine, in good order and condition, to the libellants, the damages of fire and navigation excepted; primage, etc.

That The Live Yankee soon after sailed for Portland, at which port she arrived about November 1, 1867, and that by reason of the improper stowage of the casks and the negligence of the master and crew concerning the transportation of the same, they were wholly lost and destroyed, to the damage of the libellants \$217.

By the answer of the respondents, John Wiggin, master, and A. S. Abernethy, intervening for their interest in the barque, the voyage in question is admitted to have been made between October 4 and November 5, 1867, and that the libellants shipped thereon, among other goods, etc., two $\frac{3}{4}$ casks of port wine, as alleged in the libel; and as to the order and condition of such casks at the time of shipment, the respondents say that they have no knowledge, but allege upon information that there were secret defects in the casks, not observed when received on board, and which

The Live Yankee.

could not have been observed or remedied after they were stowed, and that the value of the goods did not exceed \$100.

The answer also denies that the casks were carelessly or negligently handled or stowed, and alleges that the loss of the wine was owing to secret defects in the casks and the perils of navigation.

On the trial the libellants read in evidence a freight receipt as follows:—

“San Francisco, October 2, 1867.—Received from P. C. Dart, 419 Front street, *in good order*, on board the barque Live Yankee, for Portland, Oregon, (the damages of fire and navigation excepted,) the following packages, marked M. & V.” Then follows a list of the goods shipped by the libellants, including the $\frac{3}{4}$ casks of wine.

It being admitted by the answer that the casks of wine were received on board the barque, to be delivered to the libellants at Portland, and also that such delivery was not made, the barque is *prima facie* liable for the value of the goods. In addition to this, it appears from the freight receipt that the casks were in *good order* when received by the master. This being so, the burden of proof is upon the respondents, to show that the loss occurred, as they allege, from secret defects in the casks, or the perils of navigation. (The Pacific, *ante*, p. 17.)

As to the latter defence, the evidence fails altogether. True, as appears from the testimony of the master, the voyage was a long and stormy one, yet so far as he is able to testify no water went down the hatches, nor did any portion of the cargo shift from its position. At Astoria the master procured a survey of the hatches, and at Portland of the cargo. Gilman, an experienced seaman, and now and then a Columbia river pilot, was one of the persons who made these surveys. He testifies that no water passed down the hatches, and that no part of the cargo had shifted its position. There is no other evidence upon this point. Under the circumstances, to attribute the leakage of the casks to the perils of the sea, would be a mere arbitrary assumption unsupported by proof. It is not enough to show that the

The Live Yankee.

vessel encountered adverse winds and heavy weather, and therefore the loss *might have been* caused by these elements. The loss of the wine being admitted, if the respondents claim that it was occasioned by the dangers of navigation, the burden of proof is upon them to show it. This fact must be established with reasonable certainty, and not rest upon mere conjecture or possibility. If upon the whole it is doubtful whether the loss arose from the perils of the sea, or the negligence or want of skill in stowing the cargo or navigating the vessel, the vessel must bear the loss.

Counsel for the respondent maintains that if it is doubtful how the loss occurred there can be no recovery—that the vessel is exonerated; and cites *Clark et al. v. Barnwell et al.* (12 How. 280.) But I do not so read this authority. The Court say in effect, p. 283, that the proof was clear that the damage was occasioned by one of the dangers of navigation, and while it was competent for the libellants to show that it might have been prevented by proper skill and diligence on the part of the respondents, unless such proof was made, the law would presume that the damage occurred without negligence or fault on the part of the master or owners.

The case cited clearly establishes the doctrine, that if it be first admitted or shown that the loss was occasioned by a peril of the sea, and upon the proof it be doubtful whether such peril could have been avoided by proper skill and diligence, and the loss thereby prevented, such doubt is to be resolved in favor of the vessel, for in that stage and posture of the case, the law shifts the burden of proof to the libellants, who must establish the negligence or unskillfulness of the respondents, before they can recover. But in the case before the Court it is not admitted that the loss was occasioned by a peril of the sea. On the contrary this is the question in dispute and the burden of proof is upon the respondents, who have the affirmative of it. Then if upon the proof it be doubtful whether the loss was occasioned by a peril of the sea, that doubt must be resolved in favor of the libellants, for the burden is upon the respondents to establish that fact.

As to the question of whether the loss arose from the insufficiency of the casks or not, the case is not so clear. The master testifies that the casks were well stowed and dunnaged, with bungs up and bilge free. To the same effect is the testimony of Gilman. In one particular, however, there is a marked difference in the testimony of these two witnesses. The master states that these casks, with the others belonging to the libellants, were stowed on the bottom of the vessel, one tier deep, on one side of the keelson, and then covered with salt in sacks. Gilman states that the casks in controversy were stowed in the middle tier of three tiers of liquor casks; that the top tier was barrels of whisky, and that there was no salt upon them, but some light boxes of dry goods. It is not necessary to conclude that either of these witnesses made an intentional misstatement about this matter, but both their statements in this respect cannot be true. One of them at least must be mistaken about the stowage and position of this part of the cargo. But this flat contradiction in the testimony of the respondents' witnesses must be taken into account in estimating the value of their testimony. The observation or memory of one of them, and the circumstances do not disclose which of them, is much at fault and unreliable.

The casks have been brought into Court. They will hold about thirty gallons each—are made of oak and hooped with wooden and iron hoops. The witnesses say they are French wine casks, or very good imitations of them. The stains and rust upon the exterior indicate that the casks are old, but no particular marks or appearances of decay can be seen. One of them is altogether empty, while in the other there is probably ten or twelve gallons. The chime-hoop is off one end of the empty barrel and a small piece of the chime broken off. From all the testimony I conclude that the casks are now in the same condition substantially as when they came out of the hold of the vessel. One witness testified that when the casks were placed upon the wharf, the bilge appeared to be pressed in, as if it had been subjected to a heavy pressure. The casks at this time have no

such appearance, and I think the witness must have been mistaken in this particular.

Frances E. Hoag testifies that he was drayman for libellants when the wine arrived. That he saw these casks on the wharf and refused to take them because in bad order. "Both of them appeared to be jammed in the head and the liquor ran out of them." On being shown the casks this witness pointed out where the leak occurred, and in my judgment, the true cause of it. The leak was in the chine, and at that end of each cask there appears to have been a pressure at right angles with the length of the cask and parallel to the direction of the head and with the staves of the head. This pressure is apparent from the present shape of that end of the empty barrel, as one of the staves of the head is drawn endwise from its place at least $\frac{1}{4}$ of an inch. This is manifest from the position of the brand, "M & V., Portland," which I suppose was put on the casks just before they were shipped. The *M.* is upon one stave and the *V.* upon another. The character & is between these letters and was made partly upon one stave and partly upon the other. Now one stave is pushed by the other, so that the corresponding parts of the character do not meet by at least $\frac{1}{4}$ of an inch. So with the word *Portland*. It extends from one stave across on to the other, but now the letters do not meet by about the same distance. The shifting of the staves of the head of this cask caused the loss of the wine. Of this there can be no little doubt. What caused the shifting of the staves, and whether the head was of proper material and workmanship to support the ordinary handling and pressure of such a voyage, may admit of difference of opinion. The respondents have not shown that there was any secret defect or insufficiency about the cask to cause this leak. By their receipt they acknowledged that the cask was in good order when they received it. This is no ordinary leakage or evaporation such as liquor casks are subject to, but substantially a total loss from an injury to the cask after delivery to the vessel. Unless, then, the respondents show that this injury or slipping of the stave in

In re James Burk.

the head was the necessary or probable result of the insufficiency of the workmanship or material of the cask or some part of it, the libellants are entitled to recover. No such proof has been made.

What has been said of the empty cask applies also to the other one. The injury to it is not near so apparent, but of the same character. The leak is in the chine, and one of the staves of the head has slipped by the other a little. The probability is, that in slinging these casks into the hold, they got jammed, or that after being stowed they were subjected to a pressure from above and near the end, which started the staves in the head as has been described.

As to the value of the wine, the only testimony upon that point is that of the libellant, Van Schuyver. He says that the wine, including freight and primage, cost \$217 in currency.

There must be a decree for the libellants for the value of the goods—\$217—with legal interest since November 8, 1867, and for costs of suit.

Eugene Cronen, for libellants.

Erasmus D. Shattuck, for respondents.

DISTRICT COURT, JUNE 27, 1868.

In re JAMES BURK.

When the grounds of opposition to a bankrupt's discharge, are insufficient in law to prevent such discharge, the bankrupt may demur to the specification thereof.

An error in an allegation in a bankrupt's petition, is not a sufficient objection to his discharge, unless it has been sworn to by the bankrupt with knowledge of its falsity.

It is a good ground of opposition to a bankrupt's discharge, that he "has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors" (§ 29), either *before* or *since* the passage of the act.

In re James Burk.

But a person who was not a creditor of the bankrupts at the time of such removal, or whose debt was then barred by lapse of time, could not have been defrauded by it, and therefore cannot make the objection.

No one has a standing in a Court of bankruptcy, as a creditor, so as to be entitled to oppose a bankrupt's discharge, until he has proved his debt.

The allegations in opposition to a bankrupt's discharge, must be separate, certain and specific, and therefore an allegation that the bankrupt in May, 1865, removed a part of his property from the district, with intent, etc., is too vague and general.

DEADY, J. The bankrupt having applied for his discharge, certain persons styling themselves "creditors of James Burk, bankrupt," oppose such discharge and specify as the grounds of their opposition, the following:

1. Said Burk has not resided in or carried on business in said district of Oregon, for six months immediately preceding the filing of this petition.

2. Said Burk *has removed a part* of his property from the district with intent to defraud his creditors, to-wit: Said Burk, on or about the middle of May, 1865, fraudulently *disposed of all* his property in said district, and fraudulently left said district with the proceeds of said property with intent to defraud his creditors.

The bankrupt by his solicitor "demurs to the specification of grounds of opposition" as "insufficient in law" to prevent the discharge prayed for, being granted.

No specific direction is given in the act, or in the general orders and forms, as to the mode in which the bankrupt may question the sufficiency of the grounds of opposition to this discharge.

Whether the objection to the specifications should be taken by demurrer or exceptions analogous to those allowed in equity, may be a question. But in one or the other of these modes it seems necessary and proper that the bankrupt should be allowed to question the sufficiency in law of the grounds of opposition to his discharge.

The first specification was abandoned on the argument as being too broad. The amended petition only avers that the bankrupt "has resided and carried on business in this district for the *longest period of time* during the six month's next

preceding the filing of his petition." The allegation is sufficient, and the objection that the bankrupt had not resided in or carried on business in the district for the full period of such six months may be true, and yet the bankrupt may be entitled to his discharge. Moreover, neither the actual or alleged residence or place of business of the bankrupt can be directly made the ground of opposition to his discharge.

If he has willfully sworn falsely in relation to either—they being material facts—this fact—the false oath—may be objected to his discharge. (§ 29).

The second specification is founded on the clause in section 29, which reads:

"Or has removed, or caused to be removed, any part of his property from the district with intent to defraud his creditors."

This clause is preceded and followed by several others in the same section, united by the disjunctive conjunction, *or*, and separated by semicolons, each of which prescribes a distinct and independent ground of objection, to granting a discharge. The second clause preceding this, concerns the destruction, etc., of books, etc., and is qualified by the words, "*since the passage of this act.*" The clause in question contains no words limiting its operation to any point of time, before or since the passage of the act. Counsel for the bankrupt insists that the qualifying words in the preceding clause apply to the subsequent one; so that the removal of property by the bankrupt, with intent, etc., must have been committed *since* the passage of the Bankrupt Act, or else it is not a sufficient ground of opposition to his discharge.

The only reason given in support of this construction is, that the one clause follows the other in point of position, in the section.

But these clauses, being separated by the disjunctive conjunction, have no dependence upon one another. Each only relates to the preliminary enactment or command, which declares:

"No discharge shall be granted, * * * if the bankrupt," etc.

In re James Burk.

Each clause is a statement of what constitutes a bar to the discharge, with only such qualifications of time and place as are therein expressly provided or fairly to be implied from the nature of the subject and the language and object of the statute. Again, if the operation of any one clause following that concerning the destruction, etc., of books, etc., is, on account of the restrictive words in the latter, limited to the time *since* the passage of the act, why are not all of such clauses so limited? If the restrictive words—"since the passage of the act"—apply to any one *following* clause, and because it is a *following* clause, they must for the same reason apply to all.

But the fact, that the clause concerning the failure to keep proper books of account, which occurs still further on in the section, is expressly restrained to such failures occurring since the passage of the act, goes to show, that in the opinion of the law-maker, each clause, as to time, was independent of the other; and, therefore, the propriety and necessity of inserting express words of limitation or restriction in any clause, which was not intended to apply to acts or omissions, done or suffered prior to the passage of the act.

It being evident that the clause in question is not restrained by the language in the preceding clause, I next consider, whether the nature of the subject, or the language and object of the statute furnish any reason for construing the clause, so as to limit its operations to removals of property occurring since the passage of the act.

The object of the Bankrupt Act is two-fold:

First, to secure a just and equal distribution of the bankrupt's effects among his creditors; and

Second, to discharge the bankrupt from his debts, provided that he has not conducted himself dishonestly in the premises.

To remove one's property from the district or country where one has done business and obtained credit, *with the intent* to defraud the persons giving such credit, is intrinsically wrong—contrary to good morals—independent of the

In re James Burk.

Bankrupt Act. Then, whether the property of Burk was removed from the district before or after the passage of the act, it was equally a dishonest act, if done *with intent to defraud his creditors*, and ought to prevent his obtaining his discharge from his debts.

But a person who was not a creditor at the time of such removal, or whose debt was then barred by the Statutes of Limitations, could not have been defrauded by it, and therefore cannot be heard to make the objection. Practically, as to him, it is not true.

So much for the principal question. The objections on the part of the creditors, or the persons styling themselves "creditors of James Burk, bankrupt," do not directly aver that either of them is a creditor entitled to make the objection—that is a creditor who has *proved* his debt. Form No. 53, of the General Orders and Forms, contains the averment, or more correctly speaking, recital, that the creditor has proved his debt, with a blank to be filled up with the amount. For aught that I know the persons making these objections, are *creditors* of James Burk in a general sense, but they cannot be regarded as his creditors in a Court of Bankruptcy, until it appears that they have proved their debts.

The objections allege that the fraudulent removal of property by the bankrupt occurred in May, 1865, but it does not appear whether any of these alleged creditors were then creditors of Burk or not. If they were not, the removal could not have been made with *intent* to defraud them, and therefore the objection is insufficient.

I am also of the opinion that the specification concerning the removal of the property, is altogether too vague and general to be triable. *In re Rathbone* (Bank Reg., 50), Blachford, J., in considering this subject, says:

"The specifications of the ground of opposition to a discharge, must, under section 31 of the act, and general Order No. 24, be as specific as the specifications of the ground for avoiding a discharge after it is granted, required by section 34 of the act. The allegations must be allega-

James Fields v. John R. Lamb.

tions of fact, and must be distinct, precise and specific, and must not be allegations merely in the language of section 29 of the act, or allegations so general, as really not to advise the bankrupt what facts he must be prepared to meet and resist."

The demurrer is sustained. The creditors may have further time to file amended objections in accordance with this opinion, if desired.

M. W. Fechheimer, for bankrupt.

Joseph N. Dolph, for creditors.

CIRCUIT COURT, JULY 21, 1868.

JAMES FIELDS v. JOHN R. LAMB AND EMMA, HIS
WIFE.

The act of July 27, 1866 (14 Stat. 306), gives each defendant in a cause the right of removal, without reference to the *status* of his co-defendants, "if the suit is one on which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants, as parties in the cause."

The act of March 2, 1867 (14 Stat. 558), does not in any particular repeal the act of 1866, *supra*, but is supplemental thereto, and adds another cause for removal of cases from the State to the National Courts.

DEADY, J. This suit was commenced in the State Court for the county of Multnomah, against the above named defendants and others; and afterwards, on March 17, 1868, upon the petition of such defendants, was, as to them removed into this Court.

The petition and order for removal was made under the act of July 27, 1866 (14 Stat. 306).

The complainant now moves this Court to remand the cause to the State Court, upon the ground that the order for the removal was made without authority of law.

From the petition it appears that Lamb and wife are citizens of the State of Kentucky; and it also appears from the

 James Fields v. John R. Lamb.

complaint, that the suit is one in which there can be a final determination of the controversy, so far as it concerns these defendants, without the presence of those who are residents of the State of Oregon. This being so, the case is within the purview of the act of 1866, giving defendants the right of removal. (*Fields v. Lownsdale et al.*, ante, 288.)

But counsel for the motion to remand insist that the act of July 27, 1866, is repealed and superseded by the act amendatory thereof, of March 2, 1867 (14 Stat. 558). It is admitted that the latter act does not *expressly* repeal the former one, but, on the contrary, only purports to amend it. The two acts are upon the same subject and must be construed together; and unless the one, or some provision of it be manifestly repugnant to the other, they must both stand.

Between these acts there is no repugnance. The latter is nothing more than what it purports to be, both in its title and body, an amendment of or supplement to the former, providing an additional cause of removal.

The act of 1866 enables a defendant, who is an alien or non-resident, to remove a cause to this Court, "so far as it concerns him," although his co-defendants may not be entitled to such removal, "if the suit is one in which there can be a final determination of the controversy, * * * * without the presence of the other defendants, as parties in the cause."

The reason of this enactment is obvious. Prior thereto, the removal of a cause on account of the citizenship of the parties, from the State to the National Courts, was governed by section 12 of the Judiciary Act (1 Stat. 79). Upon the construction given to this section by the Courts, an alien or non-resident defendant, if joined with a citizen of the State where the action was brought, was denied the right of removal, because his co-defendant was not entitled to it. (*Smith v. Rines et al.*, 2 Sum. 336; *Den ex dem. v. Babcock*, 4 Wash. C. C., 344; *Ward v. Arredondo*, 1 Paine, 411; *Wilson v. Blodgett et al.*, 4 McLean, 373; *Wormley v. Wormley*, 8 Whea. 451.)

James Fields v. John R. Lamb.

This technical construction of the act excluded many persons from the benefit of it, whose cases were fully within the reason of it. The term—"the defendant"—although used in the singular number, was construed in a *collective* sense, so as to include all the persons sued, be they many or few. If *any* of these persons were not aliens or non-residents, then this technical defendant, constituted of all the individual defendants, was held not to be an alien or non-resident, and therefor not entitled to a removal. To remedy this evil, so far as practicable, the act of 1866 was passed.

The act of 1867 provides, that a citizen of another State, whether he be plaintiff or defendant, may remove a cause to the National Court upon making an affidavit to the effect that he believes, that from prejudice or local influence, he will not be able to obtain justice in such State Court.

Between this provision and the act of 1866 there is neither conflict or repugnance. Another cause of removal is simply added to those already provided. The latter act is supplemental to the earlier one.

Neither was it necessary to make the affidavit in this case, required by the act of 1867. This removal was made under the act of 1866, on account of the citizenship of the parties solely, and not for the cause specified in the act of 1867—that the defendant believes he cannot obtain justice in the State Court on account of "prejudice or local influence."

In conclusion, it is sufficient to say, that the act of 1867 does not repeal that of 1866, but amends it, not by changing it, but by adding thereto another cause of removal. They are both upon the same subject matter and can stand together without a shadow of repugnance or conflict in any particular.

The removal was authorized, and the motion to remand is denied with costs.

W. W. Chapman, for the complainant.

W. W. Page and *W. Lair Hill*, for the defendants.

In re John B. Wallace.

DISTRICT COURT, JULY 25, 1868.

In re JOHN B. WALLACE.

An adjudication declaring a person a bankrupt, is in the nature of a judgment *in rem*, and therefore notice to and binding upon all the world.

Under the Bankrupt Act of 1867 (§1), the several District Courts have equity, jurisdiction and power over all "acts, matters and things to be done under and by virtue of the bankruptcy," and are authorized by summary proceedings to administer all the relief which a court of equity could administer under the like circumstances upon regular proceedings.

Notice of an application for an injunction in bankruptcy need not be given, unless specially directed; and the provision in the act of March 2, 1793 (1 Stat. 334) prohibiting writs of injunction from being granted, except upon notice to the adverse party, applies only to suits in equity in the Supreme and Circuit Courts.

In exercising the equity power which pertains to a District Court, as a Court of bankruptcy, it is not deemed necessary or proper that resort should be had to the plenary proceedings common to suits in equity; but a petition stating the facts and praying the particular relief sought, is sufficient.

This was a petition by certain of the creditors of a voluntary bankrupt, for an injunction to restrain other creditors from selling the property of the bankrupt on execution.

DEADY, J. This petition was filed on June 13, 1868. It sets forth that the petitioners—The Bank of British Columbia and others, are creditors of the bankrupt, and that on May 30, 1868, Wallace filed his petition in bankruptcy in this Court, and that on June 8, he was, by the register, duly adjudged to be a bankrupt. That about May, 20, 1868, the respondents—C. M. Lockwood and others—commenced actions against the bankrupt, in the State Courts for the county of Multnomah, to recover certain debts alleged to be due them, and caused the property of the bankrupt to be attached to satisfy any judgment they might obtain therein; and that between June 1 and 8, these respondents obtained judgments in the actions aforesaid, by default.

That afterwards said respondents sued out executions upon said judgments and placed them in the hands of the respondents, Stitzel and Hudson, sheriff and constable respectively of said county, and that said sheriff and constable

are about to sell the property of the bankrupt upon such execution.

Two days after the filing of the petition for injunction, an order was made allowing an injunction until the further order of the Court.

The respondent, Lockwood, now comes and demurs to the petition, and for cause of demurrer alleges:

1. That the facts stated are not sufficient to entitle the petitioners to the relief prayed for; and,

2. That this Court has not jurisdiction of the matters involved in this suit as set forth in the petition.

In support of the first ground of demurrer, counsel for Lockwood insists, that the petition should show that the respondents had notice of the adjudication in bankruptcy.

The adjudication in this Court, by which Wallace was declared a bankrupt, determined his legal status in that respect, and so far is binding upon all the world. These respondents had therefore constructive notice of the decree in bankruptcy, and that is a sufficient answer to this objection. The decree is in the nature of a proceeding *in rem* before a Court having jurisdiction of the subject matter, and is notice and evidence to third persons, not actually parties thereto, that Wallace had committed an act of bankruptcy for which he had been duly decreed a bankrupt. (*Morse v. Godfrey et al.*, 3 Story, 391; *Shawhan et al. v. Wherritt*, 7 How. 643.)

The second ground of demurrer raises the question: Has the District Court equity power in proceedings in bankruptcy?

Section 1 of the act of 1867, constitutes "the several District Courts of the United States," *Courts of Bankruptcy*, with "jurisdiction in their respective districts in *all matters and proceedings* in bankruptcy."

This Court being thus declared a *Court of Bankruptcy*, with jurisdiction over all matters and proceedings in bankruptcy, it would seem to follow, as a matter of course, that such equity power inherently belongs to it, as may be found necessary and proper to maintain and exercise the jurisdiction thus granted.

In re John B. Wallace.

And the act, as if anticipating the question: What is a matter or proceeding in bankruptcy? goes farther, and in the same section declares, that “the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy: *to the collection of all the assets of the bankrupt; to the ascertainment of the liens and other specific claims thereon; to the adjustment of the various priorities and the conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.*” And also, that “said Courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein, in equity.”

The judgments now sought to be enforced by the respondents against the property of the bankrupt, were all given after the filing of the petition in bankruptcy. The decree pronouncing Wallace a bankrupt, took effect by relation, from the date of such filing, and divested him of all property not excepted from the operation of the act and saved to him by section 14. The attachments of the respondents, being levied within four months of the commencement of proceedings in bankruptcy, will be dissolved by the assignment to the assignees, and for the purpose of this petition, must now be considered as of no effect.

This being the state of the case, it is apparent that the respondents by their executions, are endeavoring to subject the estate of the bankrupt—now and since May 30 under the exclusive jurisdiction of this Court, for distribution among all the creditors—to the exclusive payment of their particular demands.

This property no longer belongs to the bankrupt, and is

In re John B. Wallace.

not liable to be taken on executions against his property. The policy and aim of the bankrupt law is to *compel* an equal distribution of the estate of the bankrupt among all his creditors. (*Shawhan et al. v. Wherritt, supra*, 644.) Can this Court prevent this interference with the estate of the bankrupt, on the part of these respondents, by injunction? After a careful examination of the act of 1867, and the decisions given under that of 1841, I think it can. Indeed, I have no doubt of it. The proceedings in bankruptcy are in the nature of equity proceedings. The property seized by the respondents is the assets of the bankrupt, and the jurisdiction of this Court is specially extended to the collection and distribution of such assets. This power, with others granted by the first section of the act, is in its nature an equity power, and may be exercised by proceedings in the nature of equity proceedings. In addition the act constitutes this Court a "Court of Bankruptcy," with power to do any act necessary and proper for the due administration and settlement of the bankrupt's estate. Proceedings by petition for the exercise of equity power were common in the District Courts under the act of 1841. (*In re Foster*, 2 Story, 131; *In re Eames*, Id. 322; *Parker et al. v. Muggridge et al.*, Id. 342; *Mitchell v. Great Works M. & M. Co.* Id. 653; *In re Babcock*, 3 Story 393; *In re Bellows & Peck*, Id. 431.) This power was expressly affirmed by the Supreme Court in *Ex parte Christy* (7 How. 312).

In re Foster (*supra*, 140), Mr. Justice Story says: "And here I lay it down as a general principle, that the District Court is possessed of the full jurisdiction of a Court of equity, over the whole subject matters which may arise in bankruptcy, and is authorized by summary proceedings to administer all the relief which a Court of equity could administer under the like circumstances, upon a regular bill and proceedings instituted by competent parties. In this respect, the act of Congress, for wise purposes, has conferred a more wide and liberal jurisdiction upon the Courts of the United States, than the Lord chancellor setting in bankruptcy, was authorized to exercise. In short, whatever

In re John B. Wallace.

he might properly do, sitting in bankruptcy, or sitting in the Court of Chancery, under his general equity jurisdiction, the Courts of the United States are by the act of 1841, competent to do."

It is the duty of this Court, by means of the jurisdiction given to it, to preserve and distribute the estate of the bankrupt among his creditors, as the act prescribes. The respondents, by means of these executions, are attempting to prevent this distribution of the estate. An injunction is a proper remedy or means to prevent this wrong and fraud upon the law from being accomplished. A petition to the Court is a proper means of invoking this power. The demurrer to the petition is overruled at the cost of the respondent.

As a matter for future practice, it is proper to add, that in exercising the equity power which pertains to this Court as a Court of bankruptcy, it is not deemed necessary or proper, that resort should be had to the formal and plenary proceedings common to suits in equity in the Circuit Court. A petition stating the facts and praying for the order, relief or proceeding sought for, is deemed sufficient. For the same reason a motion by Lockwood to dissolve this injunction, would have been sufficient without resorting to the formality of a demurrer. Nor need notice be given of an application for an injunction, unless specially directed. The restriction in the act of 1793 (1 Stat. 334), against issuing injunctions without notice, applies only to suits in equity in the Circuit and Supreme Courts. It does not affect the allowance of injunctions under the equity power conferred upon the District Courts by the Bankrupt Act, in relation to matters pending therein, and within its exclusive cognizance.

W. W. Page, for petitioners.

Erasmus D. Shattuck, for respondents.

The Ranier.

DISTRICT COURT, AUGUST 1, 1868.

THE RANIER.

Sections 2 of the act of 1838 (5 Stat. 304), and 1 of the act of 1852 (10 Stat. 61), which give penalty against a steamboat navigating the waters of the United States in violation of those acts, do not forfeit any interest in said boats for such violations; but only give the United States a right to collect such penalty by a proceeding *in rem* against the offending boat, and until a seizure in such proceeding, the United States has no lien upon or interest in such boat, by reason of such violation.

On May 2, 1868, the United States commenced suit against the steamboat Ranier, for sixteen penalties, amounting in the aggregate to \$8,000, for violations of section 2 of the act of July 7, 1838 (5 Stat. 304), and section 1 of the act of August 30, 1852 (10 Stat. 61), commonly called the Steamboat Acts. The boat was taken into custody by the marshal, under process issued in the suit. The Cowlitz Navigation Co. afterwards made claim to her as owners, and confessing the libel applied for a remission of the penalties. On July 25, in pursuance of an order of this Court, made on the petition of the claimants, the Ranier was sold for the sum of \$4,500.

On July 11, an interlocutory decree was given in the suit, whereby the United States was adjudged to have a lien upon the boat for the sum of the penalties sued for and incurred as aforesaid; and, also, that sundry seamen and material men, before then duly intervening for their interests in said boat, have a lien upon the same, for the several sums due them, which sums were by said decree found and adjudged to amount in the aggregate to the sum of \$3,025.19.

DEADY, J. The question now arises in this case, which has the prior lien upon the funds in Court, the United States or the intervenors? The proceeds of the sale not being sufficient to satisfy the claims of both parties, if the United States has the prior lien, nothing will be left for the

• The Ranier.

intervenors, unless the Secretary of the Treasury should remit the claim of the former.

The liens of the seaman and material men are given by the local law (Or. Code, 768). They attach from the time of performing the labor or furnishing the materials. This is admitted by counsel for the United States, but he also maintains that the lien of the United States for each of these penalties, attached at the time of the violation of the act by which it was incurred, and that this being so, the lien for some of the penalties is prior to the liens of some of the intervenors.

Section 2 of the act of 1838, after prohibiting steamboats from navigating the waters of the United States without license, "and without having complied with the conditions imposed by that act," provides: "And for each and every violation of this section, the *owner or owners of said vessel shall forfeit and pay to the United States* the sum of \$500, one half for the use of the informer, and for which sum or sums the steamboat or vessel so engaged *shall* be liable, and may be seized and proceeded against summarily by way of libel in any District Court of the United States, having jurisdiction of the offence."

Section 1 of the act of 1852, after prohibiting the licensing of vessels, propelled in whole or in part by steam, and carrying passengers, when not equipped as required by that act, provides: "And if any such vessel shall be navigated with passengers on board, without complying with the terms of this act, *the owner thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which this is an amendment.*"

The argument for the United States assumes that the incurring of each of these penalties, worked *pro tanto* a forfeiture of the boat.

Now, the act of 1838 does not in terms forfeit any part of the boat, but the penalty given thereby of \$500, is declared to be forfeited by the owners thereof. The legal effect of this enactment is not to forfeit any specific thing or interest therein, but to give the United States a right of action

against the owners of an offending boat for that amount of money, to be made out of their general property, according to the ordinary course of judicial proceedings, and, also, specially out of such boat by a proceeding *in rem*.

The act of 1852 is somewhat different in language, but in my judgment the legal effect is the same. When it declares that the owner and vessel "shall be *subject* to the penalties contained" in the act of 1832, it in effect provides that they shall be *liable* thereto, and *in the manner* provided in said act of 1838.

Both the owner and boat are *liable* for the penalty, from the time of the commission of the offence, but no right or interest in such boat or any other property of the owners is thereby transferred to the United States, nor until it commences proceedings to enforce the claim of such penalty and seizes or attaches such boat or other property by due process of law to satisfy the same.

On the other hand, if the two acts taken together declare a forfeiture by the owners of a penalty of \$500, generally, or a special interest of that value in the offending boat, then the forfeiture is given in the alternative, and neither takes effect, until the government makes its election, by the commencement of proper proceedings, which to recover. (*Caldwell v. The United States*, 8 How. 379). Upon this theory of the law, the United States would not acquire any interest in the boat until it elected to proceed against it, rather than the owners thereof, and the boat had been taken on process in such proceeding. But the liens of the intervenors had attached before this election was made, by the commencement of this suit.

But if the forfeiture of the boat or an interest therein was absolute, and transferred the property therein from the time of the violation of the act to the United States, still it *seems* that it would be subject to the claims of the seaman and material men. The United States would take it as a purchaser—*cum onere*.

In *United States v. Wilder*, (3 Sum. 314), Mr. Justice Story, in considering a similar question, by way of illustration,

The Ranier.

says: "Besides, it is by no means true, that liens existing on particular things, are displaced by the government becoming or succeeding to the proprietary interest. The lien of seaman's wages and of bottomry bonds exist in all cases" as much against the government becoming proprietors by way of purchase, or *forfeiture*, or *otherwise*, as it does against the particular things in the possession of a private person."

In *The Florenzo* (1 Blatch. & Howl. 65), there was a decree, condemning the vessel as forfeited to the United States, subject to the claims of the seamen and material men, who were to be first paid out of the proceeds of the vessel. No question was made upon this point in the argument, and the decree preferring the seamen and material men seem to have passed as a matter of course. The libel of the seaman was filed before that of the United States, but from the statement of the case, it is probable that the act causing the forfeiture occurred before the lien of the former occurred. (See also *Cutter v. Rae*, 7 How. 731.)

Still, these authorities do not explicitly decide that seaman's wages earned *after* a forfeiture of a vessel to the United States, are a lien upon the same as against the United States. In the case at bar, most of the claims for materials accrued before the boat commenced to run in violation of the act, but the wages of the seamen and the violations of the act were earned and happened during the same period.

But I am not satisfied that either the act of 1838 or 1852, or both taken together, forfeit any interest in the boat, either absolutely or in the alternative. In my judgment, the only forfeiture given by sections 1 and 2 of these acts is the penalty of \$500. As has been shown, this in legal effect is nothing more than a right of action against the owners to recover such penalty *as a debt due from them to the government*. In addition to this, and to facilitate the *collection of this debt*, the offending boat is made liable *in rem*.

This provision may be likened to the right of attachment on mesne process in a common law action. In certain cases,

In re J. J. Walton and C. W. Walton.

the general property of a debtor is made *liable* to such attachment as a security for the satisfaction of the plaintiffs demand. But until the property is attached, no lien arises in favor of the plaintiff in the writ. So here, the boat is liable to be seized and proceeded against *in rem*, as a means of enforcing the collection of the debt due from the owners—the penalty forfeited by them, and the lien of the United States attaches upon the seizure of the boat, and is therefore subordinate to the prior liens of the intervenors.

The decree of the Court is, that the claims of the intervenors for wages and materials, as found and determined by the interlocutory decree of July 11, be first paid out of the fund in Court, and that the sum thereby found due the United States, remain unpaid until the application of the claimants for remission of the penalties is heard from, or the further order of this Court.

Joseph N. Dolph, for the libellant.

W. W. Page, for the claimant.

W. W. Thayer, *E. W. Hodgkinson* and *David Logan*, for the intervenors.

DISTRICT COURT, AUGUST 8, 1868.

In re J. J. WALTON AND C. W. WALTON.

Where a creditor obtains a confession of judgment from an insolvent debtor, and it appears probable that such confession was taken with knowledge of the debtor's insolvency, the proof of such creditor's claim will be postponed until after the choice of an assignee.

Objection to proof of a claim must be made by written allegation, specifying with reasonable certainty the grounds of such objection.

DEADY, J. On July 2, 1868, a petition was filed in this Court, in bankruptcy, against J. J. and M. Walton, merchants in Eugene. On July 11, they were, without opposition, duly declared bankrupts.

In re J. J. Walton and C. W. Walton.

On August 3, Henry Failing and Allen & Lewis by C. H. Lewis, appeared before the register and offered to prove claims against the estate of the bankrupts—that of A. & L.'s being \$3,982.64, and H. F.'s, \$2,002.33. Objection being made by the petitioning creditors to the proof of these claims until an assignee had been chosen, the register, under section 4 of the act, has adjourned the matter into Court for decision. Accompanying the register's statement of the matter, is a copy of the schedules and warrant, and the depositions of C. H. Lewis and Henry Failing, respectively, in proof of the claims above mentioned.

From these, it appears, that A. & L. and H. F., are wholesale merchants in Portland, and that the Waltons being indebted to them on account, for goods, etc., sold and delivered, they severally induced the bankrupts to confess judgments in their favor for the above mentioned sums. That said judgments were confessed, without action, on Saturday, June 27, 1868, and that on the Monday following, A. & L. and H. F., acting through the same attorney, sued out executions and levied upon the property of the bankrupts, including the stock of goods on hand, supposed to be worth about \$4,000. At the date of the judgments the bankrupts were insolvent—their indebtedness being largely in excess of the value of their assets. So far as the bankrupts are concerned, the confessing of these judgments was an act of bankruptcy. It must be inferred from a comparison between their indebtedness and assets, as shown by their schedules, that they were then insolvent. Section 39 of the act makes a confession of judgment by an insolvent or bankrupt or given in contemplation of bankruptcy or insolvency an act of bankruptcy. To be in a state of insolvency or to contemplate insolvency, is simply for the debtor to be or contemplate being unable to pay his debts as they become payable. A person may be insolvent without having committed an act of bankruptcy—an act for which he may be declared a bankrupt by proceedings *in invitum*. (*Buckingham et al. v. McLean*, 13 How. 167; *In re Black & Secor*, 1 Law Times, B. R. 41.)

After the decree in bankruptcy in this case had passed, A. & L. and H. F., through their attorney, directed the sheriff, holding the executions against the bankrupts, to turn over the personal property levied on to the messenger, and return the executions to the clerk's office, which was done. By the law of this State, these judgments were a lien upon the real property of the bankrupts, in the schedule mentioned, in favor of the judgment creditors and they also acquired a lien upon the personal property, by virtue of the levy of the execution thereon. By means of these proceedings these creditors received a preference over the other creditors of the bankrupts. Until the contrary is shown, it must be presumed that this preference was intended to be given by the bankrupts, for the reason that it was the natural and probable consequence of their act—the confessing of judgment to A. & L. and H. F., while in a state of insolvency.

If the creditors had no reason to believe that the bankrupts were insolvent or contemplated insolvency, when they took these judgments and obtained this preference, then their judgments are good, but under section 20 of the act they can only be admitted to prove the balance of their debts after deducting the value of their liens. This involves an arrangement with the assignee, and presupposes the choosing of the assignee before they are allowed to prove their debts.

But if, on the other hand, these creditors had reason to believe that the bankrupts were insolvent or contemplated bankruptcy or insolvency, when they took these judgments and obtained this preference, then they are not entitled to vote for an assignee. "No person who has received any preference contrary to the provisions of this act, shall vote for or be eligible as assignee." (Bankrupt Act, § 19.) And under section 23, they would not be allowed to prove their debts until they surrendered to the assignee all property, etc., or advantage received by them under such preference.

The last clause of section 39 authorizes the assignee to

In re J. J. Walton and C. W. Walton.

recover back—obtain by judicial proceedings—any property transferred by a bankrupt contrary to the act, if the person receiving the property had “reasonable cause to believe that a fraud on the act was intended or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.”

Taking this section alone, and a creditor who has received a preference contrary to the act, cannot be allowed to prove his debt at all—in other words he is precluded from recovering any part of the assets of the bankrupt. But I am inclined to the opinion, that section 23 must be considered with section 39, and that a creditor who has received a preference contrary to this act, may surrender such preference, voluntarily to the assignee, and be allowed to prove his debt and share in the estate.* But if such creditor does not voluntarily surrender the property or benefits obtained by such preference, and the assignee is driven to “recover back” the same by judicial proceedings, then I think he is debarred from proving his debt or sharing in the estate.

Under section 23, if the Judge entertains doubts of the *validity* of the claim, or the *right* of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.”

I have no doubt as to the *validity* of these claims, that is, I am satisfied that they are genuine—not fictitious—and justly due by the bankrupts to the creditors. But the *right* of the creditors to prove them is not so plain a question.

If the creditors received this preference *not* contrary to the provisions of the act, then these proceedings as to them were valid, and as we have seen they cannot prove their debt, but only such part of it as the assignee may ascertain is due, after deducting the value of the property held under the lien of their judgments. As this arrangement cannot be made until after the choice of an assignee, in the nature of things these creditors must be precluded from voting for an

* See *In re Walton & Walton*.

In re J. J. Walton and C. W. Walton.

assignee. But if they are now allowed to prove their debts, then under section 13, they would be qualified to vote for assignee.

But if this preference was received contrary to the provisions of the act, then under the most favorable view of the law for these creditors, they could not be allowed to participate in the election of the assignee, and therefore should not be allowed to prove their debts until an assignee was chosen, and had an opportunity to investigate the matter and resist the application, if justice to the other creditors requires it.

I do not now propose to decide absolutely the question whether these creditors had reason to believe these bankrupts were insolvent when they took these judgments. A judgment by confession is an effectual means of transferring property from a debtor to a creditor, and I do not think it can be considered as an act done in the ordinary course of the debtor's business. It is therefore *prima facie* fraudulent—that is, contrary to the provisions of the act, both as to the debtor and the creditor receiving it. The burden of proof is upon the creditor to overcome this presumption. In accordance with these conclusions I will direct the following order to be certified to the Register:

ORDER.

Upon reading and consideration of the statement and accompanying papers reported to me by the Register, touching the claims of Allen & Lewis and Henry Failing, against the estate of the bankrupts—

It is ordered, that the proof of such claims be postponed until an assignee of the estate has been chosen or appointed; and that if the proof of such claims is thereafter objected to, it must be done by a written allegation, specifying with reasonable certainty and brevity, the grounds of such objection; and thereupon the Register, after notice to the assignee, must proceed to take the evidence for and against such objection, and report the same to the Court, with his findings of facts and law thereon.

John R. Lamb v. Lewis M. Starr.

J. M. Whalley and *M. W. Fechheimer*, for petitioning creditors.

Erasmus D. Shattuck, for A. & L. and H. F.

CIRCUIT COURT, SEPTEMBER 9, 1868.

JOHN R. LAMB AND EMMA (*his wife*) AND IDA SQUIRES
v. LEWIS M. STARR, JAMES P. O. LOWNSDALE,
MILLARD O. LOWNSDALE (*by his guardian, said James
P. O.*), RUTH A. LOWNSDALE (*by her guardian John
Blanchard*), MARY E. COOPER AND HIRAM AND
HANNAH SMITH.

The estate granted to a married person by section 4 of the Donation Act (9 Stat. 497), is a qualified or determinable fee, with a contingent remainder to the survivor and children of such person; and in case he or she dies intestate, before patent issues, such remainder becomes vested in such survivor and children, who take as donees of the United States, and not as the heirs of the deceased.

A patent for lands issued to a deceased person, enures to the benefit of the successor in interest of such person. (5 Stat. 31.)

Effect of partition between the children of Nancy Lownsdale and the heirs and vendees of her husband.

Where one owning an undivided fifth of a certain block of land executes a quitclaim deed of his interest therein, containing at the close this clause.

“and by these presents give them (the grantee and his heirs) peaceable possession of the same, to have and to hold, for their own use and benefit forever:” Held, not to be a covenant for quiet enjoyment of any part of the premises, nor a recital or representation which would estop the grantor from asserting an after acquired interest in the same block.

DEADY J. This suit was brought by the complainants, on December 26, 1867, to procure a partition of block 218 in the city of Portland, and to declare void a purchase thereof, by the defendant, Starr, on the ground that said Starr took the conveyance of such block to himself, with notice and in violation of certain trusts, upon which the same was conveyed to Starr’s grantors by the ancestor of the complainants—Daniel H. Lownsdale.

John R. Lamb v. Lewis M. Starr.

Neither of the defendants—James O. P. Lownsdale, Millard O. Lownsdale, Ruth A. Lownsdale, Mary E. Cooper, Hiram and Hannah Smith—have appeared, and as to them the complaint is taken for confessed.

On January 27, 1868, this Court, after argument, overruled the demurrer of Starr to the part of complaint alleging a trust, and also disallowed as insufficient three pleas, pleaded by him in bar of the suit.

On July 20, 1868, the case was argued and submitted on the complaint, answer of Starr, replication thereto, and proofs.

The answer of Starr, repeats the matter contained in the first and second of his plea. The opinion of this Court upon the questions raised by these pleas has been given, and it is not necessary to reconsider them now.

From the pleadings, proofs and admissions of the parties, the facts material to the decision of this case, appear to be:

I. That on September 22, 1848, Daniel H. Lownsdale, being a widower and unmarried, settled on a tract of public land embracing the block in controversy, and containing about 180 acres; and that said Daniel H., on July 10, 1850, intermarried with Nancy Gillihan, the widow of William Gillihan, and that on April 10, 1854, said Nancy died intestate, leaving her children, Isabella Ellen and William Gillihan, and Millard O. and Ruth A. Lownsdale.

II. That said Daniel H. continued to reside upon the tract of land aforesaid from the date of the settlement aforesaid for more than four years thereafter, and that in pursuance of such settlement and residence and the Donation Act of September 27, 1850 (9 Stat. 497), the proper officers of the United States land office set apart the east half of said tract to said Daniel H., and the west half thereof, embracing the block in controversy, to said Nancy; and that on October 17, 1860, a patent certificate was duly issued by the office aforesaid for the tract aforesaid, to the said Daniel H. for the east half aforesaid, and to the said Nancy for the west half aforesaid; and that in pursuance of the premises

John R. Lamb v. Lewis M. Starr.

as above stated, on June 6, 1865, a patent was duly issued to said Daniel H. and Nancy for their respective portions of said tract as aforesaid.

III. That on May 4, 1862, Daniel H. died intestate, leaving as his heirs-at-law, the complainants, Emma Lamb and Ida Squires, the children of his daughter Sarah, before that time deceased and his four surviving children, defendants herein, namely—James P. O., Millard O. and Ruth A. Lownsdale and Mary E. Cooper; and that the complainants herein, at the commencement of this suit, were and now are citizens of the State of Kentucky, and that the said complainants, John R. and Emma Lamb, are husband and wife; and that the defendant, Starr, is a resident and citizen of the State of Oregon.

IV. That on April 1, 1858, the said Daniel H., for the nominal consideration of \$3,800, by deed, “bargained and sold, released and quitclaimed unto Lansing Stout, his heirs and assigns, all his right, title, interest, claim and demand, both at law and in equity,” to five blocks containing eight lots each, in the city of Portland, one of which was block 218 aforesaid; and said deed, after describing the premises, concludes in these words—“together with all and singular the appurtenances thereto belonging, and by these presents give them peaceable possession of the same to have and to hold to their own use and benefit forever. In testimony whereof,” etc.; and that on the day and year last aforesaid, said Stout, for the nominal consideration of \$1,000, conveyed, by deed, in all respects similar to the one from Daniel H. to him, “all his right, title and interest, both at law and equity” to the undivided one half of four of the blocks described in the deed aforesaid, from Daniel H. to Stout, including block 218 aforesaid, to Alonzo Leland; and that on December 5, 1864, the said Alonzo Leland and Rachel B., his wife, conveyed all their interest in said block 218 to the defendant, Starr; and that on February 14, 1863, the sheriff of Multnomah county, Oregon, upon an execution issued out of the Circuit Court for such county, against the property of said Stout, sold the undivided one half of said

John R. Lamb v. Lewis M. Starr.

block 218 to said Starr, for the sum of \$775, and on December 24, 1863, said sheriff, as sheriff, by deed, duly conveyed to said Starr the undivided half aforesaid, as fully, as by law he was authorized to do.

V. That in January, 1860, Daniel H. purchased the interest of the said Isabella Ellen, then intermarried with one William Potter, in the estate of her mother, Nancy Lownsdale, and took a conveyance of the same to him, the said Daniel H., duly executed by the said William Potter and Isabella Ellen, his wife.

VI. That in 1864, the said William Gillihan, Jr., by his guardian, commenced a suit in the Circuit Court for the county and State aforesaid, for a portion of the west half of the tract aforesaid, set apart to his mother, Nancy Lownsdale, as aforesaid, claiming in such suit to be entitled to an undivided fifth thereof; in which suit, the parties to this suit and divers others, the vendees of Daniel H. were defendants; and the said Court, on May 22, 1865, among other things, decreed, that Daniel H., in his lifetime, was entitled to one undivided fifth of said west half, as the heir of Nancy, and also to another undivided fifth, as the vendee of said William Potter and Isabella Ellen, his wife, and that said William Gillihan, Jr., and Millard O., and Ruth A. Lownsdale were each entitled as the heirs of Nancy, to one undivided fifth of said west half; and afterwards on August 12, 1865, said Court, in said suit, by its decree set apart to said William, Millard O. and Ruth A., in severalty, certain specified portions of said west half, and to the heirs and vendees or claimants under Daniel H., according to their respective interests the remaining portion of said west half, including block 218; and because such partition was unequal, it was further provided by said decree, that said William, Millard O. and Ruth A., should have compensation from their co-tenants in the aggregate, to the sum of \$39,156.02, and that said sum should be a lien upon that portion of the west half set apart, as aforesaid, to the heirs, etc., of Daniel H., of which sum, \$1,533.45 was by such decree apportioned to and made a lien upon block 218; and it was further de-

John R. Lamb v. Lewis M. Starr.

clared by said last mentioned decree that nothing therein should prejudice the lawful claims of any of the defendants therein, being heirs or claimants under Daniel H., as between themselves; and that if any such heir or claimant, being then in possession of any parcel of the partitioned premises, should pay the owelty charged thereon, and be afterwards evicted therefrom or from any portion thereof, by any other of such defendants, he should have a lien upon such parcel or portion thereof for the reimbursement of such owelty with interest.

VII. That the conveyance by Daniel H. to Stout, of his interest in block 218 as aforesaid, was made upon a secret trust in writing, that the said Stout would reduce the same to possession, and dispose of it, and apply the proceeds to the payment of the debts of Daniel H.; and that the said Starr at the time he took the conveyances from the Sheriff of Multnomah county, and also from Alonzo Leland and wife, as aforesaid, had no notice of said trust; and that Starr paid the owelty assessed upon said block 218, by the decree of the Circuit Court aforesaid, and that he was, at the commencement of the suit, and still is in possession of the same, but not adversely to these complaints.

VIII. That the property in controversy herein exceeds in value the sum of five hundred dollars.

IX. That the said Daniel H. at the time of making the deed to Stout as aforesaid, did not represent or profess to said Stout that he was the owner in fee of said block 218, nor that he could and would receive a patent therefore; and that the time of making said deed and prior thereto, the said Stout was the regular attorney of the said Daniel H.; and that said deed to Stout was made upon no other consideration, than the trust declared in the contemporaneous writing as aforesaid.

From this statement of the facts in the case, it appears that from the date of the settlement of Daniel H. upon the tract of land described in the patent certificate, that the United States, by section 4 of the Donation Act, granted said tract to Daniel H. and Nancy, his wife, in equal parts,

John R. Lamb v. Lewis M. Starr.

to be divided between them by the officers of the proper land office. Nancy having died intestate prior to the issuing of the patent, her share or interest in the donation—which is the west half—was by the same statute granted over to her husband and children in equal proportions. They did not take as the heirs of the deceased under the local law of descent, but directly as donees of the United States. The estate granted to Nancy in the west half, was a qualified or determinable fee, for although it might have continued forever and descended to her heirs *ad infinitum*, yet by the terms of the grant it was liable to be determined—terminated—by the happening of this event, the death of Nancy before patent and without will. In contemplation of this contingency, the statute granted Nancy's share of the donation in equal parts to her husband and children. Until the happening of this event, so long as it was possible to happen, the husband and children, had a contingent remainder in the land. After it did happen, the estate became absolute in them. They took this interest as donees of the United States, and not as heirs of Nancy. As it was, Nancy's estate in the land terminated with her death, and she left nothing in it to descend to, or be inherited by any one. The husband and children are in by purchase and not by descent. (*Fields v. Squires, Ante*, 366.)

It appears that the certificate and patent in this case have been issued under a misapprehension of the facts. They are issued to Nancy for the west half, while in fact she was dead years before. In the meantime the act had vested the land designated in the record, in her husband and children. In such case the patent to the deceased wife may be held to within the *spirit* of the act of May 20, 1836 (5 Stat. 31), Section 1 reads:

“In all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who had died, or shall hereafter die before the date of such patent, the title to the land designated therein, shall enure to and become vested in the heirs,

John R. Lamb v. Lewis M. Starr.

devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life."

In this case, the land designated in this patent could not vest as it would have done if issued to Nancy during her life, because the Donation Act otherwise provided. The person to whom the patent was issued is dead, and the persons to whom the act gave the land in that event, although neither "the heirs, devisees or assignees" of Nancy, are her successors in interest, and the persons to whom the patent should have issued. Unless this patent to Nancy can be considered as enuring to them under the act of 1836, it must be deemed void. (*Scheadd et al. v. Sawyer*, 4 McLean, 183.) For this is not a case of title by patent, but of grant by a statute, and in which the patent is only official evidence of a compliance with the subsequent conditions annexed to the grant.

This point has not been argued by counsel, and as between the parties to this suit, there seems to be no question made about it. They all claim under the statute grant to the husband and children on the death of Nancy.

Having thus ascertained the persons to whom block 218 as a part of the west half was granted by the United States, it remains to determine the present ownership of it.

Daniel H. having acquired one fifth of the west half under the Donation Act, and purchased another fifth of Isabella Ellen Porter, he became the owner of two fifths of such tract. The other three fifths were owned by William Gillihan, Jr., and Millard O. and Ruth A. Lownsdale, the children of Nancy. The two fifth interest of Daniel H., so far as not disposed of by him in his lifetime, upon his death descended to his four living children and the representatives of his deceased daughter, Sarah—the present complainants.

By the decree in the partition suit, certain parcels of the tract were allotted in severalty to the three children of Nancy, and the remaining portion of the tract was allotted to the heirs and grantees of Daniel H., according to their respective interests. The partition was made between these two classes, the children of Nancy and the heirs and

John R. Lamb v. Lewis M. Starr.

grantees of Daniel H. As between the individuals of the latter class no partition was made, nor was there any conclusive determination as to who were such heirs or vendees. By far the larger part of the tract was allotted to the heirs of Daniel H., and for that reason a certain sum of money was charged upon it in favor of the children of Nancy, to make the partition equal in value. By the partition, the children of Nancy were divested of their three fifths interest in the part allotted to the heirs of Daniel H., and the latter were divested of their two fifths interest in the part allotted to the children of Nancy. On the whole, the heirs of Daniel H. gained in quantity by the partition, but were required to pay the difference in value in money. But the grantees of Daniel were not so effected. They yielded nothing in the partition and received nothing. (*Fields v. Squires, Ante*, 366.)

Among others, block 218 was allotted to the heirs and vendees of Daniel H., according to their *respective interests*. Lansing Stout was the only person who appears to have received a conveyance from Daniel H. of any interest in the block. Whatever that interest was, it has been since acquired by the defendant Starr. The sale to Stout was of all Daniel H.'s interest at that time. Daniel H.'s interest at that time was only a fifth. His other fifth he purchased some years afterwards. Starr is then the owner of one fifth of the block, and the heirs of Daniel H. of the other four fifths in equal parts. The heirs of Daniel H., within the narrow limits of block 218 gain in quantity, but in consideration they are made to yield their interest elsewhere throughout the tract. and pay the children of Nancy a certain owelty. But Starr had no interest in the tract outside of this block. As has been already said, he neither lost or gained by the partition, nor did he yield up an interest in one block to receive an equivalent for it in another. He got what he had purchased, and no more or less—the interest of Daniel H. in block 218, on April 1, 1858, and that was an undivided fifth and no more.

But the principal argument for the defendant is made upon the concluding words of the deed from Daniel H. to

John R. Lamb v. Lewis M. Starr.

Stout. Counsel contend that these amount to a covenant for quiet enjoyment as to the *whole* block, and that therefore Daniel H. and all persons claiming under him are estopped to claim any interest in the block, whether they are otherwise entitled to it or not.

The deed, as has been stated, was a simple quitclaim of the *interest* of Daniel H. in the block, and there is no single expression in the deed that has any other different signification. The words which are said to constitute a covenant for quiet enjoyment, are these: "and by *these presents* give them (Stout and his heirs) peaceable possession of the same to have and to hold for their own use and benefit forever." Stress has been laid upon the proximity of the clause professing to give possession and the habendum. But the habendum clause does not add to or diminish the effect of the other, "To have and to hold" what? Block 218? Not at all, but only the interest of Daniel H. in that block, on April 1, 1858, the date of the deed, and nothing more. But, adds counsel, the words are "to have and to hold to their *own use and benefit forever*." Yes, whatever is quitclaimed is forever, and not for a day or for life. But what is it Stout was to have and to hold forever? Not block 218, but only the interest of Daniel H. therein, be that less or more.

As to the clause professing to give possession, in deference to the earnestness and argument of counsel, I have examined it and re-examined it to see if it could possibly be construed into a covenant for quiet enjoyment of the whole premises, or even any part of them; but I can find no countenance for such a construction on either reason or authority. This clause contains neither a recital nor a promise, but simply a statement as to a present fact, which might or might not have been true. Daniel H., by this clause says—"by these presents I give the grantee herein peaceable possession of the same." What does "the same" refer to? Surely the interest conveyed, which was the then interest of Daniel H. in the block—an undivided one fifth, and no more. As one tenant in common is entitled to the possession of the

John R. Lamb v. Lewis M. Starr.

whole premises, Daniel H., upon the sale of his undivided fifth of Stout, might have put him in possession of the whole block, but not to the exclusion of his co-tenants. Yet if he had, he would not thereby covenant that Stout should have quiet enjoyment of the premises thereafter, or of any part of them. Nor would an express covenant that Stout should quietly enjoy the interest then quitclaimed, estop the heirs of Daniel H. from claiming the other four fifths of the block. But this clause does not amount to an assertion or admission that Daniel H. did in fact put Stout in possession at all. The words are—"by these presents"—that is the deed—"give them peaceable possession." Then there was no actual possession given, but only such possession as resulted from the execution and delivery of the deed. This was no possession at all, but only that right to the possession which is the incident of legal ownership. If the clause was not in the deed, in this respect its legal effect would be the same. The parties did not go upon the land and pass the possession in the presence of witnesses, and endorse a memorandum thereof on the deed, nor did the grantor deliver the grantee a key or clod from the premises, as a symbol of possession.

It must be admitted this possession clause is an unusual one, and that it does not appear necessary to make good or realize any apparent purpose or intention of the grantor, and for this reason, among others, it has been urged by counsel for Starr, that it must have been intended to secure to Stout or his grantees any future interest which Daniel H. might acquire in the block. But the object of inserting this clause is, I think, quite apparent, when you read the declaration of trust executed by Stout at the time he received this deed. In this paper the deed is described as a mere "quitclaim," and Stout reserves the option either to sell the property, including this block, or *reduce it to possession on the best terms in his power*. Then, as a matter of fact, Daniel H. did not put Stout into possession. This clause was probably inserted in the deed upon the idea that it would assist the grantee therein, in a contemplated controversy with the

Medorum Crawford v. F. M. Johnson *et al*

School District, which at that time claimed the property as a donation from Daniel H.

Upon the legal aspect of the case this is sufficient. Four fifths of the block belong to the heirs of Daniel H. in equal parts, and the other fifth to Starr, and upon this basis there must be a partition between them, with provision to secure to Starr the repayment of the owelty, with interest.

Nor do I think that any one concerned, unless it be the heirs of Daniel H., has any right to complain of the result. The fifth which Starr, as an innocent purchaser, without notice of the trust, obtains, neither Daniel H. or his heirs received any consideration for. But, as it was the fault or neglect of Daniel H. that the declaration of trust was not put upon record, he or his heirs must bear the loss rather than an innocent purchaser.

On the other hand, this block being situated to the west of Park street, there could have been no doubt, at the date of the deed from Daniel H. to Stout that the property was within the wife's half, and that Daniel H. had no other than a one fifth interest in it.

Decree accordingly.

W. W. Page and *W. Lair Hill*, for complainants.

W. W. Chapman, for defendant Starr.

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CIRCUIT COURT, SEPTEMBER 14, 1868.

MEDORUM CRAWFORD *v.* F. M. JOHNSON, THOMAS SMITH AND R. H. TAPP.

If a deputy collector of internal revenue fails to pay over, to his principal, taxes collected by him, under the proviso in section 67 of the act of July 13, 1866 (4 Stat. 172), the Circuit Court of the United States has jurisdiction of an action by the collector upon the bond of said deputy to recover the amount of such taxes.

Medorum Crawford v. F. M. Johnson *et al.*

A collector of internal revenue is considered as receiving an "injury to his property," on account of an "act by him done," within the meaning of the proviso aforesaid, when a deputy appointed by him embezzles the taxes given him for collection.

This action was commenced on May 13, 1868, and on the 23d of the same month, the defendants Smith and Tapp were duly served with a summons, but the defendant Johnson was not found. On June 11, Smith entered an appearance by his attorneys, and on the 13th of the same month filed a motion to dismiss the action as to him, because "the Court has no jurisdiction of the person of the said defendant or of the subject matter of the said action;" and on September 7, the plaintiff filed a motion "for judgment for want of an answer or other pleading within the time allowed by law and the rules of this Court." The two motions were argued together and the former disallowed, on the ground that objection to the jurisdiction cannot be made otherwise than by plea or demurrer, and the latter continued.

On September 9, the motion for judgment was allowed as against Tapp, and the defendant Smith had leave to file a demurrer to the complaint, objecting that the Court had not jurisdiction of the subject matter of the action, and that the facts stated do not constitute a cause of action, which was then argued and submitted.

DEADY, J. From the complaint it appears, that on and prior to November 1, 1866, and ever since, the plaintiff was and has been collector of internal revenue for the district of Oregon, and that on or about said November 1, the plaintiff appointed the defendant Johnson, deputy collector of internal revenue for the sixth assessment district of Oregon, and that said defendant as principal, with the defendants Tapp and Smith as sureties, on said November 1, executed and delivered to the plaintiff, as collector aforesaid; a bond in the penal sum of \$2,000, to be void upon the condition that said Johnson would faithfully perform the duties of deputy collector for the district aforesaid, etc.; and that the defendant Johnson failed

Medorum Crawford v. F. M. Johnson *et al.*

to account for the sum of \$1,978.42, of taxes placed in his hand for collection, but collected the same by virtue of his said office, and converted the amount to his own use, "for which sum the plaintiff is liable to account for and pay to the United States;" and that said plaintiff by reason of such failure, has been put to \$21.58 expense, in addition to the sum aforesaid, for which sum of \$2,000 he prays judgment.

A proviso to section 67 of the act of July 13, 1866 (14 Stat. 172), provides: "That if any officer appointed under and by virtue of any act to provide internal revenue, or any person acting under or by authority of any such officer, shall receive any injury to his person or property for or on account of any act by him done, under any law of the United States, for the collection of taxes, he shall be entitled to maintain a suit for damages therefor, in the Circuit Court of the United States, in the district where the party doing the injury may reside or shall be found."

Upon this proviso, counsel for plaintiff rests the jurisdiction of this Court.

On the argument, counsel for Smith practically abandoned the objection to the jurisdiction of the Court. In this respect, the demurrer seems to have interposed upon the impression that the plaintiff relied upon a similar provision in section 2 of the act of March 2, 1833 (4 Stat. 632), concerning "the collection of duties on imports," to support the jurisdiction of this Court, and that such provision only applied to the collection of *external* revenue—duties on imports.

But the proviso quoted from the act of 1866, gives the same jurisdiction to this Court in cases of actions for injuries arising from acts done under the internal law, as under the laws for the collection of duties on imports.

The objection that the complaint does not state facts sufficient to constitute a cause of action, is, I think, not well taken. True, the complaint only states that the plaintiff is *liable* to pay the money converted by his deputy, to the United States, and under ordinary circumstances, a mere

Medorum Crawford v. F. M. Johnson *et al.*

liability to suffer from the acts or omissions of another, does not give a right of action against such other. Some injury must actually result from such act or omission. A mere *liability* to be injured is not equivalent to an actual injury.

But in this case, I think the plaintiff is more than merely liable to the United States for this money. The law makes him absolutely responsible for the conduct of his deputies, and also charges him with the whole of the taxes contained in the lists delivered to him for collection. *Prima facie*, the amount of the tax list is a fixed and ascertained indebtedness, for the payment of which he has given bond. This sum collected by Johnson, he is bound to pay.

The condition of the bond is to keep the plaintiff harmless from any *liability* on account of any act or omission of Johnson's. In this respect the complaint follows the terms of the condition, and, so far as the bond is concerned, is a sufficient statement of a cause of action in any view of the matter.

But it is doubtful if this Court has jurisdiction of an action between these parties for a *mere liability* upon this bond, because the act of 1866 limits the jurisdiction to cases where the officer or person shall receive an *injury* to his person or property.

Instead of making the allegation of the complaint in the language of the bond, it would have been proper to have averred the fact to be, as it was admitted on the argument, that the plaintiff had already paid over the amount to the United States. If so, he has received an injury to his property to that extent—he has lost so much of it on account of his act in appointing Johnson deputy collector of taxes.

But I think it proper, under the circumstances, to hold, that as this amount of taxes was charged to the plaintiff by the government, the money for the time being is to be considered as his own, and therefore taken or embezzled from him by Johnson, to his injury.

The demurrer is overruled and judgment must be given for the plaintiff.

John H. Mitchell, for plaintiff.

John H. Reed, for defendant, Smith.

The United States v. Cyrus Olney.

DISTRICT COURT, NOVEMBER 2, 1868.

THE UNITED STATES v. CYRUS OLNEY.

Where 600 parcels of land were sold for the uniform price of \$50 each, to be distributed among the purchasers by lot, and 300 of such parcels were not worth more than \$50 each, and the other 300 were worth from \$100 to \$5,000 each; *Held*, that the scheme was a lottery, and the manager thereof a dealer in lottery tickets, and liable to pay a license as such.

The term lottery—definitions of.

A revenue law is to be liberally construed, so as to attain the end for which it was enacted.

This action was brought to recover the sum of \$100, alleged to be due the United States from the defendant, as a special tax for engaging in the business of a lottery dealer. It was commenced October 17, 1867, and tried by the Court, without the intervention of a jury. The facts of the case are stated in the findings of the Court, as follows:

I. That the defendant, on March 15, 1867, at Astoria, in the district aforesaid, being the owner of a large number of town lots in such town of Astoria, did then and there divide the greater portion of the same into six hundred parcels, for distribution by lot among the persons who should become the purchasers thereof, as hereinafter stated.

II. That three hundred of such parcels consisted of one lot each, of not less than fifty dollars value; and the other three hundred of such parcels, in and by such division and the scheme hereinafter stated, were denominated prize parcels, and consisted of two, four, and six lots each, of the value of fifty dollars each, and single lots varying in value from one hundred to six hundred dollars, and one house and lot of the value of one thousand dollars; and also, one cottage and three lots of the value of five thousand dollars.

III. That afterwards the defendant prepared a scheme for the sale and distribution of such parcels of lots and presented the same to the public by advertisements in different newspapers in general circulation, and by a descriptive pamphlet, widely circulated, for the purpose of inducing the

The United States v. Cyrus Olney.

public to purchase tickets or shares, representing parcels in such scheme.

IV. That by the scheme aforesaid, each of the parcels of property aforesaid, were offered for sale at an uniform price of fifty dollars; and that on and before May 15, 1867, the defendant sold all the tickets or shares aforesaid, at the uniform price aforesaid, and thereupon in pursuance of the scheme aforesaid, the number of the lot or lots constituting each parcel was written on separate ballots and sealed up and placed in a box, and the name of each purchaser was written on as many separate ballots as he had purchased tickets or shares, and sealed up and placed in another box; and thereafter, on the day last aforesaid, under the supervision of a committee of three persons, selected in pursuance of such scheme, a ballot was drawn from each of the boxes aforesaid, and the name of the purchaser and the description of the property thus drawn were recorded by a clerk, and then another ballot was so drawn from each of such boxes, and recorded by the clerk as aforesaid, until all ballots were drawn from each box, and recorded as aforesaid; and thereupon the persons whose names were thus drawn, were, in pursuance of such scheme, declared to be the purchasers of the parcel or parcels of property so drawn by them, and the defendant executed deeds to them, therefor, accordingly.

V. That about one third of the contracts for the purchase and sale of the tickets or shares in the scheme aforesaid, were in writing, in two parts, one of which was signed by the defendant, and in these words:

“ASTORIA, May 1, 1867.

“This certifies that Paul Corno has subscribed for twenty shares in my scheme for the sale and distribution of town lots in Astoria, Oregon, and will be entitled to a warranty deed for the property, which shall be drawn to him according to the prospectus, on payment of the note given for the purchase money.

(Signed.)

CYRUS OLNEY.”

The United States v. Cyrus Olney.

And the other of which was signed by the subscriber, and in these words:

“\$1,000.

ASTORIA, May 1, 1867.

“For value received, I promise to pay to the order of Cyrus Olney, one thousand dollars, in gold coin. This note is given for twenty shares in the Astoria town lot distribution, and is payable when the deed is ready for delivery, according to the prospectus.

(Signed.)

PAUL CORNO.”

VI. That the defendant during the period and between the dates aforesaid, or at any time thereafter, on account of the scheme and drawing aforesaid, did not pay to the United States the special tax, or any part thereof, by law imposed upon lottery ticket dealers.

And, as a conclusion of law from the premises, the Court finds that the defendant on and between the dates aforesaid, in selling the tickets or shares as aforesaid, in the scheme aforesaid, was engaged in the business of a lottery ticket dealer; and that thereby such defendant became and still is liable to pay to the United States a special tax of one hundred dollars.

DEADY, J. The law imposing this tax is found in subdivision 6 of section 79 of the act of July 13, 1866 (14 Stat. 116), which reads as follows:

“Lottery ticket dealers shall pay one hundred dollars. Every person, association, firm or corporation, which shall make, sell or offer to sell lottery tickets or fractional parts thereof, or any token, certificate or device representing or intending to represent a lottery ticket or any fractional part thereof, or any policy of numbers in any lottery, or shall manage any lottery, or prepare schemes of lotteries or superintend the drawing of any lottery, *shall be deemed a lottery ticket dealer.*”

The statute imposes a tax upon a dealer in lottery tickets, and also declares who shall be deemed such dealer, but it does not define or limit the signification of the word *lottery*.

A person to be liable as a dealer in lottery tickets must in some of the modes or instances mentioned in the statute, be engaged in the preparation, conduct or management of a *lottery*—so that the liability of the defendant turns upon the question: What is a lottery? The answer to this question must be found in the meaning of the word, as established by usage and authority. I assume, with the argument for the defendant, that the legal and popular meaning of term coincides, and that it is used in the statute according to its primary and general acceptation. Indeed, I am not aware that the word has any technical or peculiar signification.

The word "lottery" is defined and used as follows by lexicographers and writers:

"A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles."—*Worcester's Dic.*

"A distribution of prizes by lot or chance."—*Webster's Dic.*

"A scheme for the distribution of prizes by chance."—*Bouvier's Dic.*

"A kind of game of hazard wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate."—*Ree's Cyclopædia.*

"A sort of gaming contract, by which, for a valuable consideration, one may by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks."—*American Cyclopædia.*

"That the chance of gain is naturally overvalued, we may learn from the universal success of lotteries."—*Smith's Wealth of Nations*, B. 1, C. 10.

All these authorities agree that where there is a distribution of prizes—something valuable—by chance or lot, that this constitutes a lottery. But the definition from *Worcester* and the *American Cyclopædia* are the most complete. From each of these it expressly appears that a valuable consideration must be given for *the chance* to draw the prize.

The United States v. Cyrus Olney.

Tried by this standard it is manifest that the scheme prepared and carried out by the defendant for the sale and distribution of these town lots was a lottery. True, the purchasers of tickets or shares were in any event to get something—at the least, a lot, for the purposes of this scheme *estimated* to be worth \$50. But it is not probable that any one would have purchased a ticket, if it was certain that he would have received nothing in return but one of these so-called fifty dollar lots. If the first three hundred lots could have been sold for fifty dollars each on account of their market value, certainly the defendant would not have been improvident enough to put the other three hundred prize parcels into market at the same price, while their actual value was from \$100 to \$5,000 each. This is neither reasonable nor probable.

The *chance* of obtaining \$5,000 for \$50 was the enticing object which the scheme held up to the public, as an inducement to purchase the shares; and this “chance of gain,” upon which depends “the universal success of lotteries,” was to be determined by lot. This scheme has all the attributes and elements of a lottery. It is a distribution by lot of a certain number of prizes among twice the number of persons; and that, too, of prizes very unequal in value. The certificate of purchase issued by the defendant to each purchaser is a ticket which entitled the holder to the chance of drawing a prize of from two to one hundred times the value of the price of the ticket. It is evident the first three hundred lots could not have been sold by any ordinary method, at \$50 each, *if at all*. This is also probably true of many of the prize parcels. Whatever may have been their intrinsic or future value, the evident aim of the scheme was to sell them for more than their market value, and this was to be accomplished by an appeal to the universal passion for playing at games of chance. The purchase of a ticket and the payment of fifty dollars, was made for the *chance* of obtaining one of the prize parcels, represented to be worth many times that sum.

This was a lottery according to the common acceptation

The United States v. Cyrus Olney.

of the word. It was a lottery within the definitions in the dictionaries.

It matters not, even if the purchaser was to receive the *full value* of his money in any event. As a matter of fact, the money was paid for the chance of a prize also, and would not have been paid without this inducement. The sale of the ticket by the defendant gave the purchaser this chance to obtain something more than he paid for. This was dealing in lottery tickets within the purview of the Revenue Act.

The argument of the defendant assumes that the purchasers of the property bought the six hundred parcels in common, and after thus becoming the owners of the same, adopted this method of distributing or dividing them among themselves.

If persons already owning family plate, pictures or other property not susceptible of division, or even equal division, choose to distribute by an appeal to lot what has thus come to them *before* they had any scheme of so distributing it, they are not within the definition of a lottery, nor liable to this special tax. They have not given a valuable consideration for *the chance* of obtaining something of much greater value—a prize.

The argument of the defendant is ingenious and plausible, but it is based upon an incorrect assumption. It ignores the fact—the mainspring of the whole transaction—that the tickets were sold and purchased for the avowed purpose of giving to each of the purchasers *a chance* to obtain a prize parcel by means of the subsequent allotment. The division by lot was not an afterthought of the purchasers, but a prominent part of the original scheme of sale and distribution as prepared by defendant.

No purchaser bought any particular lot or parcel, or any undivided interest in the whole property. Each purchaser bought the right to have, by allotment, one of the three hundred lots, estimated to be worth \$50 each, and the chance of obtaining instead of such lot, one of three hundred prize parcels, represented to be worth from \$10 to

The United States v. Cyrus Olney.

\$5,000. The chance of obtaining one of these prizes—and even the most valuable one—rather than the \$50 lot, induced the purchaser to buy and enabled the defendant to sell the certificate of purchase. Indeed, the sale of the first three hundred lots, in three hundred parcels, for fifty dollars each, upon the condition that they should be distributed among the purchasers by lot, would itself be a lottery, unless the lots were *in fact* of equal value—which is very improbable.

The case is in almost every respect the counterpart of the celebrated American Art Union, decided in 1852. The scheme of the Art Union was, that by paying \$5 any person could become a subscriber and entitled to an engraving and certain numbers of the *Bulletin*, containing the proceedings of the society, and the *chance* of obtaining one of a number of valuable paintings, which in December of each year were to be distributed by lot among the members. The drawing was to be conducted precisely as in this case—by placing the name of the subscriber in one box and the number of the painting in another. A number being drawn from the latter box, a name was drawn from the former one, and the person whose name was thus drawn, was to be the owner of the prize represented by that number.

The Supreme Court decided that this was a lottery. (*The People v. The American Art Union*, 13 Barb. 577.) The case was then taken to the Court of Appeals, and argued on behalf of the Art Union with great ability. The Court of Appeals affirmed the decision of the Supreme Court, that the scheme was a lottery. (*The Governors, etc. v. The American Art Union*, 7 New York, 228.) The proceeding in the New York Courts was to enforce the forfeiture of the property proposed to be distributed by this scheme, and the case turned upon the construction or interpretation of the word “lottery” in the prohibition contained in the Constitution of the State—“No lottery shall hereafter be authorized in this State.”

This action is simply to enforce the collection of a tax imposed by the United States upon all lotteries. A revenue

The United States v. Cyrus Olney.

law is not to be strictly construed, but rather the contrary, so as to attain the ends for which it was enacted. With the policy or impolicy of allowing lotteries the Revenue Act does not interfere. It simply provides for taxing them, whenever and wherever they in fact take place. They are specially and heavily taxed, not for the purpose of encouraging or prohibiting them, but upon the same ground that many other special taxes are laid; because, as a rule, it is well known that their owners and managers receive from the public large gains, without giving any equivalent therefor.

Keeping this end in view, it is apparent that the Revenue Act ought to be so construed, as to include every case of the distribution of property or money, which contains the essential elements of a lottery—the payment of a valuable consideration for *a chance of obtaining by lot*, something more valuable in return.

It is true, the defendant may have engaged in this scheme without any thoughts of becoming a dealer in what the law deems lottery tickets. Indeed, other motives than the hope of actual gain may have induced him to make the sale and distribution that he did. In the prospectus of the scheme, published by him, he asks the question:

“Why is this property put into a raffle at prices which average less than half the selling rates?” and answers it as follows:

“Only because the sale to citizens, for actual improvement, at full prices, at the rate of three to five thousand dollars a year, on time, as heretofore, is no longer adapted to the circumstances of the proprietor, who has become an invalid, and must hasten to complete the improvements and enterprise which he has in hand.”

But even upon this mild view of the scheme, for the purpose of taxation, it must be considered, or rather *is*, a lottery. By it many persons are induced to buy property, which has no *present market value*, and which they otherwise would not purchase at any price, because there is set before them *the chance of obtaining by lot* a certain prize or piece of

Haizlette v. Lake.

property of much greater value than the consideration advanced.

Judgment must be given for the plaintiff for the sum sued for, and the costs and disbursements of the action.

Addison C. Gibbs, for the plaintiff.

The defendant in *pro. per.*

CIRCUIT COURT, NOVEMBER 6, 1868.

D. J. CORREY AND CUNNINGHAM HAIZLETTE v. B. H. LAKE AND J. R. LAKE.

CUNNINGHAM HAIZLETTE v. J. R. LAKE.

An attachment will lie against the goods of a debtor who is about to dispose of them with intent to delay or defraud the plaintiff in the action without reference to the defendant's conduct or purpose as to his other creditors.

Proof of a general intent by the defendant to dispose of his property for the purpose of preventing a particular creditor from collecting his demand, by legal proceedings, is sufficient proof that the defendant is about to do so, whenever such creditor brings an action to recover his debt.

Effect of re-delivery of property, taken on attachment, under sections 152 and 157 of the Civil Code (Or. Code, 178-9), to the defendant.

The first entitled action was brought upon a judgment given against the defendants by confession of attorney, in the Court of Common Pleas for Hancock county, Ohio, on November 15, 1867, for \$1,052.08, with interest and costs. The second one was brought upon the promissory note of the defendant, J. R. Lake, made and delivered to the plaintiff therein, on June 22, 1859, in the State of Minnesota, for the sum of \$777.57, with interest at ten per centum per annum.

Upon October 8, 1868, an attachment was issued in each action, upon which the property of the defendant, J. R. Lake, was attached to answer the demands of the plaintiff therein. Thereafter the marshal delivered the property attached to the defendant upon his undertaking to re-deliver

Haizlette v. Lake.

the same or pay the value thereof, in case the plaintiff recovered judgment.

On October 17, J. R. Lake filed motions to dissolve the attachments on the ground:

I. That they were allowed without sufficient cause; and,

II. That the undertakings for the writs were not given in sufficient amounts.

The motions to dissolve were heard and submitted together, on November 3, and reserved for consideration.

DEADY, J. The affidavit for the writ of attachment in each of these actions was made by Thomas Fitch, the agent of the plaintiffs, who are residents of the State of Ohio. The affidavit states that R. J. Lake "is about to remove his property from the State of Oregon, or assign or dispose of it, with intent to delay or defraud his creditors."

On the argument, the objection that the undertakings for the writs were not given in sufficient amounts was abandoned.

In support of the objection that the attachments were allowed without sufficient cause, counsel read the affidavit of defendant, J. R. Lake, and of sundry other persons, who appear to be more or less acquainted with the business and resources of such defendant, in Portland. In reply, counsel for the plaintiffs read the affidavits of Fitch and one Williams.

The affidavits of the plaintiffs tended to prove that J. R. Lake, had, in 1866, assigned his property to his Portland creditors, primarily, for the purpose of preventing the collection of these claims, and that if sued upon them, he would again make some disposition of his property to prevent the plaintiffs from making anything on execution, if they obtained judgments against him.

The affidavits of the defendant tended to prove that J. R. Lake, in partnership with one Robinson, his brother-in-law, had, since 1864, been doing quite an extensive business in stoves and tin-ware, at Portland; and, that since 1867 he had been engaged with one Goddard, dealing in horses; and that these two firms, of which Lake is a member, are in

Haizlette v. Lake.

apparently a prosperous condition, and have, in certain instances within the knowledge of affiants, and generally so far as they know, done business in Portland in an honest and business-like manner.

The affidavit upon which the attachments were issued, establishes a *prima facie* case, which is not overcome by the affidavits read by the defendant. A defendant may be in prosperous circumstances, and have dealt fairly by his creditors in Portland, and yet he may intend to dispose of his property, so as to prevent non-resident creditors—these plaintiffs for instance—from collecting their debts.

If a defendant intends, or it appears probable that he intends to dispose of his property, for the purpose of delaying or defrauding the particular creditor who is plaintiff in the action, that is a good cause for an attachment by the latter. A creditor is delayed or defrauded when his debtor hinders or prevents him from taking his property on execution to satisfy his debt; and an intention or purpose to so delay or defraud a creditor is equally a cause for attachment. (Or. Code, 175.)

So far as appears from the proofs submitted, the defendant J. R. Lake, however honest in his conduct or intentions as to his other creditors, did intend to so dispose of his property if he could, as to prevent the collection of these demands; and this purpose he has deliberately entertained for years past.

Counsel for the motion make the point, that proof of a *general* intent on the part of the debtor to prevent the collection of these debts, is not sufficient to support the statement in the affidavit upon which the attachments issued—that the defendant *is now* about to dispose of his property with intent, etc. But this is a distinction without a difference. That which a person intends to do generally, it may be properly said he is about to do, ready to do, whenever the particular occasion for so doing, occurs. The bringing of these actions was such an occasion in these cases. If a plaintiff, under such circumstances, must wait for an attachment until the defendant is apprised of the commencement

Haizlette v. Lake.

of the action, and begins to carry out his general intent, by disposing of his property, he may as well not have it at all.

Counsel for plaintiff objects to this motion, that the defendant having received the property attached from the marshal under section 152 of the Civil Code (Or. Code, 178), he cannot now move to discharge the attachment, as such receipt and the undertaking therefor to the marshal, were in legal effect an affirmance and discharge thereof.

But this view of the matter is not tenable. The delivery under section 152 is optional with the marshal, and cannot be compelled by the defendant. When it takes place, practically, the defendant becomes the bailee of the marshal, who, in contemplation of law, still holds the property under the writ of attachment. (*Duncan v. Thomas et al.*, 1 Or. 314.) The transaction takes place between the officer and the defendant, and is permitted for their mutual convenience. By it the attachment is not effected, nor does the defendant admit or affirm its legality.

On the other hand, the re-delivery to the defendant which takes place under section 157 of the Civil Code (Or. Code, 179), in pursuance of a judicial order on the application of the defendant, does supersede the attachment and discharge it. After obtaining a delivery under this section, the defendant cannot go back and question the legality of the attachment for any cause.

The motions to dissolve the attachments, are denied at the costs of the defendant.

Walter W. Thayer, for the plaintiff.

J. H. Reed, for defendant, *J. B. Lake*.

The Almatia.

DISTRICT COURT, NOVEMBER 12, 1868.

THE ALMATIA.

A justifiable discharge of a seaman by the master, *for bad conduct*, will work a forfeiture of the wages previously earned.

Courts of admiralty will not forfeit a seaman's wages for a single act of disobedience, however trivial or provoked.

A stipulation in shipping articles in derogation of the general rights of seamen, as established by the maritime law, is void, unless it was fully and fairly explained to them, and additional compensation allowed them, adequate to the restrictions and risks imposed thereby.

DEADY, J. This is a suit *in rem* for seaman's wages. The defence set up in the answer is desertion and disobedience of orders, whereby the libellants forfeited their wages.

The material facts are as follows: The libellants, George Mills, Albert Miller, Frank Stizleye, Nels. Nelson, William Nelson, Henry Nelson, Howell Lewis and John Lewis, between the fourteenth and twentieth of August, 1868, shipped as seamen on the Almatia, then lying at the port of San Francisco, for a voyage to the port of Portland-on-Wallamet, and thence back to the port of departure. The bark sailed from San Francisco on September 1, and made the dock at Portland on the thirtieth of the same month. Upon reaching the latter port, the first mate was immediately paid off and discharged, but for what reason does not appear. The second mate then acted as first officer, and proceeded with the discharge of cargo. The libellants were the only seamen on board. On Sunday morning, October 4, the second mate called the men out about six o'clock, and set them to doing the ordinary work about ship. They washed down the decks, and furled four sails which had been loose since the Tuesday previous. The weather was calm and dry. When this work was done, the second mate ordered the libellants to loose and unfurl the foresail. This sail had been furled the Tuesday previous by the order and under the direction of the first mate. It was then half-past eight o'clock, and the custom was to have breakfast on Sunday morning at eight. There was no necessity of unfurling the

sail at that time. To this order the men replied that it was after eight o'clock and they wanted their breakfasts. The officer immediately reported this answer to the master, who had the men called aft. On coming aft, the master asked the men what was the matter? They answered that they wanted their breakfasts. To this the master replied—You want your breakfasts, do you? The master then asked if they would furl the sail; they replied that it was after eight o'clock, and they wanted their breakfasts. The master then said—You refuse duty then; mind, you got nothing coming to you. The men replied—We don't refuse to do our duty, but we want our breakfasts. The master then ordered the second officer to go ashore and get men to furl the sail. The officer did so, but none were obtained, and the sail was not refurled until the following Monday evening. No more notice was taken of the men.

By the direction of the master, the cook allowed them breakfast, dinner and supper on Sunday. The men slept on board, but were not called to turn out on Monday morning. About half-past seven, they applied to the cook for breakfast, but he refused them, as the master had given him orders not to let them have any. About this time a gang of longshoremen came on board and commenced to discharge cargo. The libellants then went to the master on the wharf, and asked him what he was going to do with them. The master said he didn't know them; that they took charge yesterday morning, and he would have nothing more to do with them. The men said they had not "taken charge" The master replied—You refused to work. Then the men asked if they could go ashore. The master answered—I don't tell you to go ashore. The men then asked him if he would pay them. The master at first said he might, if anything was coming to them; and then said *no*, get it out of the ship, if you can.

Thereupon the libellants left the bark, and brought this suit for wages.

Upon this state of facts, the defence of desertion must fail. The libellants remained on board the vessel for

The Almatia.

twenty-four hours after their qualified refusal to furl the foresail, ready and willing, so far as appears, to do duty whenever called upon. During all this time no attention was paid to them, or orders given them by the officers; and finally, by direction of the master, they were denied their usual food. On Monday morning, when the libellants finally applied directly to the master for orders, he said that he did not know them, and in effect that he was done with them. This was a discharge by the officers, and not a desertion by the crew. Desertion by the maritime law is a quitting the ship and her service without leave, and against the duty of the party, with no mind to return again. (*Cloutman v. Tunison*, 1 Sumner, 375.) These libellants left the vessel with no mind to return, but not until they were in effect bidden to do so, by the language and conduct of the master and mate.

It being ascertained that the libellants did not desert the vessel, but were discharged therefrom at an intermediate port, it remains to be considered whether the discharge was justifiable or not. A justifiable discharge of a seaman by the master, *for bad conduct*, will work a forfeiture of the wages previously earned. This is a rule of justice and policy which pervades the maritime law. (3 Kent's Com. 198.)

But it is not every trivial act of disobedience or neglect of duty that will justify the discharge of a seaman, or work a forfeiture of his wages. In the case of *The Mentor* (4 Mason, 84), Mr. Justice Story discusses this question at great length. At page 90 he says:

"There must be a case of high and aggravated neglect or disobedience, importing the most serious mischief, peril or wrong; a case calling for exemplary punishment and admitting of no reasonable mitigation; a case involving a very gross breach of the stipulated contract for hire, and going in its character and consequences to the very essence of its provisions." And again, on page 91, he says:

"I should be very sorry, indeed, to lay it down as a general proposition, that any act of disobedience by a seaman,

The Almatia.

however slight, is, of course, to be visited with a forfeiture of wages, or will justify a master in dismissing him in the course of the voyage. Such a principle, it seems to me, would be very disastrous to the commercial interests of the country, and would involve so many difficulties in the application, that the denial of wages would soon, from the necessities of the case, with reference to the ordinary habits of seamen, introduce an essentially different contract into maritime employment. My opinion is, that the disobedience must either be an act of very gross nature, involving serious danger, a mischief or malignancy; or it must be habitual and produce such a general diminution of duty as goes to the very essence of the contract." To the same effect is 3 Kent's Com. (*supra*.) The case of *The Mentor* (*supra*), involved the consideration of the consequences of an attempt to create a revolt on ship board. The learned judge, in the course of his opinion, declared that even the commission of such an offence is not "in all cases, to be visited with a total forfeiture of wages;" and by way of illustration adds (page 93):

"Cases may easily be conceived, where the seamen have, in a legal sense, committed the offence, and yet under such circumstances of gross provocation and misconduct on the part of the master, as to form a very strong excuse, addressing itself to the conscience and mercy of the Court."

Taking these rules and principles as a guide for the decision of this case, it is plain that the discharge of the libellants was not justifiable, and that they ought to forfeit their wages for the single act of the qualified refusal to refurl the foresail on Sunday morning.

The first mate had been discharged and the second mate had taken his place. It is quite probable that the libellants, in feeling at least, in this matter, took part for the first mate and against the second one. It is equally probable and even more so, that the second mate regarded the crew with disfavor and intended to hector them out of the vessel and get rid of them. There was no trouble on board with the libellants, until he became first officer.

The Almatia.

The libellants have been before the Court and four of them were examined as witnesses. They appeared very well for men in their station of life, and those of them who were upon the witness stand gave their testimony intelligently and candidly. One of them had been on the ship for three years continuously.

The testimony for the claimants, consists of the depositions of the master and second mate, and a third person who appears to have been idling on the dock at the time of the altercation between the men and the officers on Sunday morning, and overheard and saw a part of what was then said and done. The cook was the only person on board who was not an actor in the scene of Sunday morning. His testimony has not been offered. No reason is given by the claimants for not producing him or his deposition. For aught that appears he is still on board the bark and within their control. The circumstance must have some weight against the claimants upon the questions of fact in dispute between them and the libellants.

The mate testifies that it was *necessary to the safety of the vessel* to refurl the foresail on that Sunday morning. The sail had been furled under the direction of the first mate and had been in that condition since the previous Tuesday, and so remained until the evening of the following Monday. The vessel was fast alongside the dock, one hundred and twenty miles from sea, and the weather was and had been calm and dry. This statement of the mate's is incredible and it cannot be supposed but that he knew better. Its falsity is evident to any one, and is shown by the testimony of the libellants and that of the ship-masters, Smith and Freeman. These circumstances are enough to throw discredit upon the testimony of the mate.

The force of the master's testimony is impaired by the fact that he was intoxicated on Sunday morning, when the affair took place, which was made the occasion for discharging the libellants, without paying their wages. It is altogether probable that the mate took advantage of his condition to bring about a dispute between the crew and him.

So soon as the men said they wanted their breakfasts, when ordered to refurl the foresail, the mate immediately, without a word of explanation, hurried off to the master with a complaint of disobedience of orders, and the result was that the men were called aft and practically discharged.

On the other hand, I do not think the libellants are wholly without fault. Although the refurling of the sail was not necessary to the safety of the vessel, it was proper and right that it should be refurled, if the officer in charge thought so. He had a right to have the sails furled to please his eye, and in accordance with his notions of what was professional and seamanlike. Some one must give the law upon these matters, and the general rule is, that the seaman must obey what his superiors command. Of course there is a limit, beyond which a seaman need not endure the caprices and persecutions of his officers, but may leave the ship and demand his wages.

But this order was not an extreme one. Fifteen minutes at the farthest would have sufficed to refurl the sail; and although the libellants may have felt (as was probably the fact), that the order was given to punish and annoy them more than anything else, yet they should have obeyed it after the master required them to do it, before breakfast. It also appears probable that the crew on Sunday morning were disinclined to work under the mate, and held back in the discharge of the morning's work, so that they furnished some excuse if not provocation for keeping them at work after the usual hour without their breakfasts.

In any event the order was not so unreasonable or oppressive as to justify the libellants in refusing to obey it, either absolutely or unqualifiedly. Nor was their qualified refusal, under all the circumstances, sufficient to justify their discharge, or work a forfeiture of their wages; particularly as they remained ready to go to work, until the master discharged them the next morning.

I shall deduct one month's wages from the compensation due each of the libellants for his misconduct in this particular.

The Almatia.

Counsel for the claimants also insist that the wages of the libellants are forfeited by virtue of a clause in the shipping articles which reads—"That if any of the said crew disobey the orders of master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of said disobedience or absence shall be forfeited; and in case such person or persons so forfeiting wages shall be reinstated and permitted to do further duty, it shall not do away such forfeiture."

This stipulation or clause is in derogation of the general rights of seamen as established by the maritime law, which does not allow a single act of disobedience, however trivial or provoked to work a total forfeiture of a seaman's wages. Such stipulations are held void by Courts of Admiralty "unless two things concur: first, that the nature and operation of the clause is fully and fairly explained to the seaman; and secondly, that an additional compensation is allowed entirely adequate to the new restrictions and risks imposed upon them thereby." (*Brown et al. v. Lull*, 2 Sum. 449.) The burden of proof is upon the claimants to show both these things. No attempt has been made to prove either of them. Tried by this test, this stipulation is void. "Courts of Admiralty are accustomed to consider seamen as peculiarly entitled to their protection;" and it is against the operation of such unjust and one-sided stipulations as this, obscurely placed among the many long lines of a closely printed formula at the head of the articles, that this protection is most required and given.

It only remains to consider the compensation which the libellants are entitled to receive.

The general rule, when a seaman is wrongfully discharged during a voyage, is to allow him wages up to the termination of the voyage. But to this there are exceptions. In some instances the compensation given by this rule would be too great and in others too small. The damages in all cases should be equal to the real loss or injury of the party. (*Emerson v. Howland et al.*, 1 Mason, 52.)

The wages agreed upon were \$35 per month for the round

The Almatia.

voyage. From the evidence it cannot be certainly known what time it will take to complete the voyage. On the argument it was admitted that the vessel was still in this port. The run from San Francisco here occupied just one month. The vessel has been in this port another month discharging and taking on cargo, and how much longer she may remain is not known. From what is known, it may be safely assumed that the return to San Francisco will occupy another month.

The libellants shipped on the 14, 17 and 20 of August. This would make the duration of the voyage about three and a half months. If the discharge was wholly wrongful and without fault on the part of the libellants, the latter would be entitled to recover the stipulated rate of wages for this time, and also the sum of twenty dollars each, the price of passage from here to the port of shipment. From this must be deducted as to each of them the sum of one month's wages for misconduct, and also the advanced wages received by two of them. The articles do not specify what kind of money the wages were to be paid in. The usage is to pay in coin, and the money advanced to Nelson and Mills, was coin. In all probability it was the mutual understanding that the wages should be paid in coin. But the contract is for so much money, and it may be satisfied by the payment of any lawful money of the United States. Under these circumstances the Court cannot decree that the wages shall be paid in coin, or that a greater sum per month than that agreed upon shall be paid in currency. However, the wages have been allowed for the round voyage. It is probable that the libellants might have returned to San Francisco, in a month less time, if they had availed themselves of the opportunities that offered, immediately upon their discharge. Supposing that this decree would be paid in currency, I have upon this point, in the absence of testimony, presumed in favor of the libellants, and given them wages for three and a half instead of two and a half months.

Decree for the libellants accordingly.

O. P. Mason, for the libellants.

W. W. Page and *W. W. Thayer*, for claimants.

Henry Coulson *et al.* v. The City of Portland *et al.*

CIRCUIT COURT, DECEMBER 12, 1868.

HENRY COULSON AND THERESA E., HIS WIFE, v.
THE CITY OF PORTLAND, HAMILTON BOYD, WILLIAM S. CALDWELL AND C. P. FERRY.

The jurisdiction of a Court of equity *to remove* a cloud upon title to real property, is confined to instances where the instrument or proceeding complained of appears to be valid on its face, but is in fact void or invalid, for some reason or matter, which can only be shown by extrinsic evidence; but, *semble*, that such Court has jurisdiction *to prevent* a cloud being cast upon title to real property, without reference to the fact whether such instrument or proceeding appears to be valid on its face or not.

A Court of equity has jurisdiction to enjoin a municipal corporation from committing a breach of trust concerning property or franchises held by it for the inhabitants thereof, but an ordinance providing for levying a tax is an exercise of legislative power, in the enactment of which such corporation acts not as a trustee, but as a local government, exercising a portion of the supreme power of the State.

A Court of equity will enjoin a municipal corporation from unlawfully issuing interest coupons, payable through a period of twenty years, and levying a tax for the payment thereof, upon the complaint of an owner of property liable to such tax, so as to prevent a multiplicity of suits.

Where a municipal corporation which has power to construct public buildings, but is forbidden "to raise money for or loan its credit to or in aid" of any private corporation, passes an ordinance providing for contracting with a railway company for the erection of public buildings, a Court has no power to inquire whether the real object of such ordinance is to provide for the construction of such buildings or to raise money, etc., in aid of said railway company.

Section 135 of the charter of Portland, prohibited the city from contracting an indebtedness exceeding \$50,000: *Held*, that an ordinance assuming a liability of \$350,000, to be paid in semi-annual installments in the course of twenty years, although it provided for the payment of such installments by the levy of taxes as they fell due, was in violation of such section and void.

A Court of equity has no power to restrain a municipal corporation in the disposition or management of taxes collected under a void ordinance, on the complaint of a single property holder therein.

This suit is brought to enjoin the defendants from countersigning and issuing the interest coupons to the bonds of the Oregon Central Railway Company, and from levying and collecting a tax upon the real property of the complain-

Henry Coulson *et al.* v. The City of Portland *et al.*

ants, within the corporate limits of the city of Portland, for the purpose of paying such interest coupons as they become due.

The complaint was filed on November 14, and a rule was then entered and served, requiring the defendants to appear on the twenty-fifth of the same month and show cause why a preliminary injunction should not issue against them, as prayed for in the complaint. On the twenty-fifth, the complainants and defendants appeared by their counsel, and consented to postpone the hearing of the motion until December 2d. On that and the following day, the motion was heard on the complaint and exhibits, and was continued for consideration.

DEADY J. The material facts stated in the complaint are as follows:

I. That the complainants are husband and wife, and citizens of California; and that the city of Portland is a municipal corporation of the State of Oregon, and that the defendants—Hamilton Boyd, W. S. Caldwell and C. P. Ferry, are citizens of the State of Oregon, and officers of such municipal corporation, namely: Mayor, Clerk and Treasurer.

II. That the complainants are owners of real property within the corporate limits of the city of Portland, of the value of \$15,000, and that such property is subject to all taxes, charges and assessments imposed on real property within the corporate limits aforesaid, by the authority of such municipal corporation.

III. That on February 5, 1868, the city of Portland, by means of the Common Council and the Mayor thereof, passed an ordinance, entitled as follows:

“An ordinance to secure material for the public buildings, and the construction of streets adjacent to the public grounds, and for other purposes, and to levy a special tax therefor.”

A copy of the ordinance is attached to the complaint and made a part of it. The first section thereof read as follows:

Henry Coulson *et al.* v. The City of Portland *et al.*

“Section 1. That for the purpose of securing gravel, stone, brick, clay, lumber and timber, and the construction and repair of the city buildings of the city of Portland, and of the streets adjacent to the public ground, and for the other purposes hereinafter provided, the corporation known as the ‘Oregon Central Railroad Company, of Portland, Oregon,’ be and is hereby authorized to issue two hundred and fifty bonds of a thousand dollars each, bearing interest at the rate of seven per centum per annum, commencing on the first day of July, 1868, and payable on the first days of January and July thereafter, semi-annually, for the term of twenty years; said bonds having thereto attached forty interest coupons to each bond, each coupon representing the half yearly interest of its respective bond; said coupons to be signed by the secretary of said company, and countersigned by the Mayor and Auditor of the city of Portland, as hereinafter provided; and to be made payable in United States gold coin, at the city of Portland, at the city treasury of said city, at Portland, Oregon.”

Section 2 of the ordinance substantially provides, that in 1868 a tax of two and a half mills on the dollar shall be levied and collected on all taxable property within the city, in the same manner as other city revenue may be collected; and that the moneys derived from said tax be appropriated and set apart as railway fund, out of which “fund” the said interest coupons, payable January 1, 1869, shall be paid as they fall due and are presented for payment.

Section 3 provides that in 1869, and annually thereafter for the period of eighteen years, in addition to the other taxes, a tax of four mills on the dollar shall be levied and collected on all taxable property within the city, in the same manner as other city revenue may be collected; and that the moneys derived from such tax be appropriated and set apart as a railway fund, out of which “fund” the interest coupons on said two hundred and fifty bonds shall be paid as they fall due and are presented for payment.

This section also provides, that the city may reduce the rate of taxation in proportion to the increase of taxable

Henry Coulson *et al.* v. The City of Portland *et al.*

property, so that the revenue derived from the same shall not be less than the sum of \$17,500 per annum in gold coin; and that, if at any time the money in the railway fund should be insufficient to pay such coupons when due, they are to be paid from the "general fund," or the Common Council may make such other contracts or arrangements to supply the deficiency as may be necessary; and that the city of Portland shall never be liable for the principal of such bonds.

Section 4 provides that the O. C. R. Co. shall grade and prepare for the rail the first five miles of the track of their railway, before December 31, 1868, and also the first twenty miles thereof before July 1, 1869, otherwise the ordinance to be null and void.

Section 5 provides, that upon the grading of the first five miles of the track, as provided in section 4, the Mayor and Auditor of the city shall countersign the coupons attached to one hundred of said bonds, and deliver the same to W. S. Ladd, to sell for the benefit of the company, at not less than eighty-five cents on the dollar, with the privilege of hypothecating the said bonds, or any portion thereof, on the best terms said company can secure to raise money; and upon the grading of another five miles of said track, said Mayor and Auditor shall countersign the coupons attached to seventy-five others of said bonds, and deliver the same to said Ladd to sell or hypothecate for the benefit of the company, as above mentioned; and also upon the grading of ten additional miles of said track, as provided in section 4, the said Mayor and Auditor shall countersign the coupons attached to the remaining seventy-five of said bonds, and deliver them to said Ladd, for sale or hypothecation, for benefit of the company, as in the case of the preceding bonds, and upon the completion of the first twenty miles of the track, said Ladd is to surrender to the company all the bonds remaining unsold.

Section 6 provides for the examination of the work on the track, and the certificate to be presented to the mayor and auditor to authorize them to countersign the coupons and deliver the bonds as directed in section 5.

Henry Coulson *et al.* v. The City of Portland *et al.*

Section 7 provides that this ordinance and the agreement of the city to pay the interest coupons as provided therein, is made upon the condition and consideration that the O. C. R. Co. contracts and agrees "at any and all times for the period of twenty years from January 1, 1869, to transport and convey over their railway all public messengers required to travel at the expense of said city, free of charge, and also transport, carry and convey over their said railway, to or from any point on their line, as may be required, free of charge, or other compensation for transportation than is provided in this ordinance, all stone, gravel, earth, lumber and timber, or other materials which the city of Portland may require, to be transported over the said company's railway for the construction or repair of streets adjacent to public grounds, public buildings of said city, and any and all purposes for which the city of Portland may now, or any other time hereafter, lawfully provide."

Section 8 provides for the execution and filing with the city clerk of the O. C. R. Co., agreement to accept the propositions contained in the ordinance, and "perform the conditions and considerations" on the part of said company, as therein specified.

Sections 9 and 10 of the ordinance provide for the contingency of the O. C. R. Co. not accepting or complying with the terms and conditions of the ordinance, and have no bearing upon the questions arising in this suit.

IV. That the O. C. R. Co. is a private corporation, incorporated under the laws of Oregon, for the purpose of constructing a railway from Portland to the northern boundary of California.

V. That the title and body of said ordinance does not truly state the object thereof, but the contrary, for the purpose of deceiving the tax payers; and that the real object of such ordinance is to raise money for and to loan the credit of the city of Portland to the O. C. R. Co., for a period of twenty years, and to the amount of \$350,000 in coin; and that said Common Council and Mayor had no power or authority to pass said ordinance, and the same is therefore illegal and void.

Henry Coulson *et al.* v. The City of Portland *et al.*

VI. That in pursuance of section 2 of said ordinance. the corporate authorities of the city of Portland, during the present year, have levied and collected, in gold coin, two and a half mills on the dollar, upon the taxable property within its limits, which tax, amounting to over \$10,000, is now in the hands of the defendant, C. P. Ferry, who threatens to pay out the same to the holders of said coupons as in said ordinance provided; and that the complainants are interested in said \$10,000 to the extent of the tax collected from their property aforesaid.

VII. That the O. C. R. Co. is grading the first five miles of its track, and threatens and intends to complete the same as in said ordinance provided, before December 31, 1868, so as to entitle it to the benefit of the first 100 of said bonds; and the said corporate authorities are threatening and do intend to issue as provided in said ordinance, the interest coupons to said 100 bonds, and deliver the same to said W. S. Ladd, whereby the faith of the city of Portland will be pledged in aid of said company to pay said interest coupons on said 100 bonds semi-annually for twenty years; and that said Ladd intends to put such bonds upon the market in the Pacific and Atlantic States for sale and circulation; and said Ferry threatens to pay the first interest coupons of the first 100 bonds on presentation of the same at his office, out of the proceeds of the two and a half mill tax, now collected.

VIII. That defendants threaten and intend to levy and collect further taxes as provided in said ordinance for the purpose of paying the interest coupons of said bonds, thereby involving the city of Portland in a debt, and lending its credit to the O. C. R. Co., of \$350,000; and unless such defendants are restrained in the premises, such bonds and coupons will pass into the hands of innocent purchasers, whereby the right of the complainants and the city to defend against the same will be defeated.

IX. That unless the defendants are restrained in the premises, the complainants will be put to the necessity of maintaining a multiplicity of actions to recover back the taxes so wrongfully collected from them, and threatened to

Henry Coulson *et al.* v. The City of Portland *et al.*

be collected for the next twenty years in aid of said O. C. R. Co.

X. That by virtue of the act incorporating the city of Portland, real property may be sold for delinquent taxes, upon a warrant issued by the Auditor and Clerk of the city, attached to the tax roll and directed to the City Marshal, and that upon such sale a deed is made to the purchaser by the Marshal, which deed is not required to recite the previous proceedings therein, and is deemed to convey the interest or estate of the person to whom the same was assessed, and that if defendants are not restrained from levying and collecting taxes upon the property of the complainants under the provisions of said ordinance, and by the means provided for the collection of taxes in the charter of said city, then there will be a cloud cast upon the title of the complainants to the real property above mentioned.

XI. That the matter in controversy exceeds the value of five hundred dollars; and that the act and doings aforesaid are contrary to equity, etc., and that the complainants are without a plain, adequate and speedy remedy at law—wherefore they pray a temporary injunction, and that upon the final hearing the defendants may be perpetually enjoined, etc.

Assuming that ordinance numbered 468 is illegal and void, the complainants' counsel insist that they are entitled to maintain suit for relief in equity upon all or either of the following grounds:

1. To prevent a cloud being cast upon the title to their property by the enforced sale of it, for this tax;
2. To prevent the corporation of Portland from violating its trust; and,
3. To prevent a multiplicity of suits.

Upon the consideration of the first ground, the question arises—what constitutes a cloud upon title?

For the defendant it is claimed that a proceeding which is void upon its face cannot cast a cloud upon title; and therefore, if ordinance 468 is void, as claimed by complainants, the tax complained of is invalid, and the invalidity is

Henry Coulson *et al.* v. The City of Portland *et al.*

apparent upon the proceedings to enforce it. For the complainants it is answered that the invalidity is not apparent, and can only be shown by extrinsic proof, because the deed given to the purchaser of property sold for delinquent taxes does not recite or set forth the proceedings prior to the sale.

The following is an abstract of the provisions of the city incorporation upon that subject.

The corporation has power by ordinance to collect taxes for general municipal purposes, not to exceed one half of one per centum upon all property within its limit subject by law to State and county taxation; and also to collect a special tax of one per centum upon the same property for any *specific* object within its authority, but the ordinance providing for such special tax must specify the object thereof and the amount necessary therefor; and the aggregate of such general and special taxes levied in any fiscal year, must not exceed one and a half per centum.. (§ 38, *sub.* 1, 23, 134.)

Property must be assessed annually for taxation and in the manner prescribed by State laws, but the time of making assessments and the returns thereof are to be prescribed by ordinance. (§§ 55, 57.)

The time for the voluntary payment of taxes to the treasurer is prescribed by ordinance, and within five days thereafter, the treasurer must return the tax roll to the Council with the taxes paid to him marked thereon; and all taxes not paid to the treasurer within the time prescribed, are to be deemed and collected as delinquent. (§§ 113, 114.)

Delinquent taxes must be collected by the Marshal, and for this purpose the Auditor, by order of the Council, must deliver to him the tax roll with a warrant annexed thereto, commanding such Marshal to collect the delinquent taxes therein as provided by law; such warrant is to be deemed an execution against property, and must be executed and returned as such; and if sufficient personal property be not found out of which to make the tax, the Marshal must levy on any of the real property of the person against whom the

Henry Coulson *et al.* v. The City of Portland *et al.*

tax is charged, but not more than enough to pay all the taxes charged to such person, and the costs of collecting the same, and sell it as upon execution. (§§ 115, 116, 117.)

When real property is sold for delinquent taxes, the person making the sale must make a deed of the same to the purchaser, which passes all the estate of the owner therein, subject to redemption as provided by law; and the return on the warrant must specify the sum for which each parcel of such property sold, and the name of the purchaser; such deed need not recite the proceedings prior to the sale, but it must appear therefrom that the property was sold by virtue of a warrant from the city of Portland, and the date thereof, together with the date of sale and the bid of the purchaser. (§§ 99, 120, 123, 140.)

From this abstract of the law governing the levy and collection of taxes by the corporation, I think it clear that if ordinance 468 is void, no extrinsic evidence is necessary to show the invalidity of this special tax. True, the deed to a purchaser at a sale for delinquent taxes does not recite the prior proceedings at length, but they are all a matter of record, and the deed refers to them particularly, by names, dates and amounts. The warrant is identified. Annexed to it is the tax roll, from which it appears what taxes were levied, and what are delinquent. If the complainant's property were sold for this special tax to pay coupons on railway bonds, the facts of the levy and delinquency would appear on the tax roll; and the warrant annexed to it and returned with it into the Clerk's office, would show the sale, and to whom and for what amount. These latter facts also appearing in the deed, there can be no difficulty in tracing the matter upon the records of the corporation from the end to the beginning—from the deed back to the ordinance.

But the authorities are not uniform as to what constitutes such a cloud upon title as will justify or authorize a court of equity to remove or prevent it, as the case may be. They all agree in the rule contended for by the defendants, but many of them go further, and decide, that although it may not be necessary to resort to extrinsic evidence to show the

Henry Coulson *et al.* v. The City of Portland *et al.*

invalidity of the instrument or proceeding complained of, yet equity has jurisdiction to prevent, cancel or annul the matter, thing or proceeding, for the purpose of preventing the title to property being affected or encumbered thereby.

In *Hamilton v. Cummins* (2 John. ch. 522), Chancellor Kent, after a careful review of the English authorities, says: "I am inclined to think that the weight of authority and the reason of the thing, are equally in favor of the jurisdiction of the Court, whether the instrument is, or is not, void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded."

Mr. Justice Chipman, sitting in the Circuit Court for the S. D. of N. Y., cites *Hamilton v. Cummins*, as authority for the expression—"the fact that the deed in question is a void instrument does not take the case out of the jurisdiction in equity." (Am. Law Reg. Nov. 1867, p. 35.) But in this last case, the deed complained of was forged and had been admitted to record in the proper office. It was not only void, but its invalidity did not appear upon its face, and could only be made apparent by extrinsic evidence. *Prima facie*, the deed was a valid one, and sufficient in law to pass the title to the property described in it.

In *Oakley v. Trustees, etc.* (6 Paige's Ch. 265), it was held that an assessment upon a town lot for altering the grade of a street, although so far void as not to affect the legal title to the lot, was a cloud upon the title, and an injunction was allowed to prevent the proposed illegal change of grade and consequent assessment.

In this case the Court assumed that the assessment was void, and its invalidity must have been apparent on the face of the proceedings. The ruling in this case coincides with that in *Hamilton v. Cummins*, but appears to be in direct conflict with that made by the same Chancellor in *Van Dorn v. Mayor, etc.* (9 Paige Ch. 388).

Yet in *Oakley v. Trustees, etc.*, the complainant was threatened with what appears to have been an irreparable injury to his property, by the illegal digging down of the

street in front of it. To prevent this injury the injunction was prayed and might well have been allowed, whether the illegal assessment was void upon its face or not. Notwithstanding, then, the remark of the Court that the void assessment would cast a cloud upon the title, I am inclined to think that the injunction was really granted to prevent a material and probably an irreparable injury to the property of the complainant.

In *Burnett v. Cincinnati* (3 Ham. 72), the sale of town lots for an illegal assessment to improve streets was enjoined. In this case the Court says: "In a city the sale of a part of lot for assessments may often be very destructive to the interests of the proprietor, though no title passed by such sale. A cloud would be cast upon the title, which litigation only could remove; and until removed the property might be valueless to the owner; subject, too, during the period of litigation to additional assessments and embarrassments."

But the more modern cases do not appear to go the length of *Hamilton v. Cummins*, or *Burnett v. Cincinnati*.

By these, the jurisdiction of equity to remove or perhaps prevent a cloud being cast upon title to real property is confined to the instances where the instrument or proceeding complained of appears to be valid on its face, but is in fact void or invalid for some reason or matter which can only be shown by extrinsic evidence. (*Van Dorn v. Mayor, etc.*, 9 Paige's Ch. 389; *Suequehanna Bank v. Supervisors of Broome County*, 25 New York, 314.)

In *Erwing v. City of St. Louis* (5 Wall. 418), Mr. Justice Field, delivering the opinion of the Court, says:

"With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits, or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence.

"In other cases the review and correction of the proceed-

Henry Coulson *et al.* v. The City of Portland *e al.*

ings must be obtained by the writ of *certiorari*. This is the general and well-established doctrine."

This was a proceeding before the Mayor to enforce an assessment imposed for benefits to adjoining property by the opening of a street. The object of the suit was to enjoin the enforcement of the order for the collection of the assessment, upon the ground that the proceedings were invalid for want of authority in law. The Court said: "If the statutes and ordinance under which the proceedings took place were void, no cloud was thereby cast upon the title of the complainant; nor were the remedies at law for the protection of his property or the redress of trespasses committed upon it in any way impaired."

As to the jurisdiction of a Court of equity to *remove* a cloud already cast upon the title to property, the case of *Ewing v. City of St. Louis* furnishes an intelligible and authoritative statement of the doctrine of to-day on the subject; but as to when a Court of equity may interfere to *prevent* such a cloud being cast, I apprehend the case does not directly determine. The question did not arise in it, but it is also true that the distinction now suggested is not noticed by it. The case of *Burnett v. Cincinnati* was a case upon which the jurisdiction of the Court was invoked to *prevent* a cloud being cast. The Court said that the proceeding complained of (a tax to improve a street), was void and that the invalidity was apparent, yet it enjoined the collection of the tax, and gave reasons as follows:

"When an assessment of a tax is made and its legality disputed, the uncertainty attendant upon the final result puts the estate upon which it operates in imminent jeopardy. If no title pass by the sale, the party has a remedy at law. He can defend his possessions; but if the title do pass, he is remediless altogether. *A mode, therefore, of deciding the question before any right is affected, is safest for all parties.*" (3 Ham. 72.)

The feudal reverence for real property of which the common law was redolent, and which the modern mercantile spirit has not yet altogether overcome, doubtless had some

Henry Coulson *et al.* v. The City of Portland *et al.*

influence in the decision of the earlier cases in favor of the interference of equity to prevent a cloud being cast upon title to land. Under the influence of this feeling and the kindred one, that municipal corporations and inferior tribunals were not qualified in power or dignity to take proceedings and make orders affecting the title to or interest in lands, Courts have gone great lengths in enjoining the interposition and collection of assessments and taxes upon real property, by municipal corporations for local purposes.

But with the growth of the country and the development its polity and institutions, so much of the power of the State—both legislative and administrative—has been parcelled out to these local governments and corporations, that it has been found impracticable to subject their proceedings to the risk of being stopped by injunction upon every suggestion or complaint of irregularity or illegality by reluctant or selfish taxpayers and property holders.

Whether, then a Court of equity has jurisdiction to *prevent* the levy and collection of a tax which is void in law, although such invalidity is apparent, upon the ground that such proceeding, if allowed to be completed, would cast a cloud upon title, is a question that I will not now definitely pass upon. Notwithstanding the generality of the language in *Erwing v. City of St. Louis*, against the jurisdiction, I am inclined to think that a careful examination of the authorities and the reasons for them, will show that the apparent invalidity of the proceeding or matter complained of, does not necessarily affect the jurisdiction of a Court of equity, to prevent by injunction the imposition and collection of an illegal assessment or tax upon real property.

The second ground upon which the equitable jurisdiction of the Court is invoked by the complainants, involves the question: Does the issuing of these coupons and the levy and collection of the tax to pay them, amount to a breach of trust by the corporation? In support of the affirmative of the question the complainants cite *Davis v. Mayor, etc.*, (Duer R. 451,) Willard's Eq. (499, 737-8-9.)

These authorities show that a Court of equity has juris-

Henry Coulson *et al.* v. The City of Portland *et al.*

diction over a municipal corporation, in regard to its conduct concerning property and franchises held by it in trust for the inhabitants thereof, the same as in the case of a natural person; and that it will enjoin and prevent such corporation from disposing of its property or franchises fraudulently or for a mere nominal consideration—and this, although the forms of legislation are used to give the transaction the appearance of an exercise of political power for public purposes. The privilege of exemption from judicial interference terminates where legislative action ends. Tried by this standard, it is apparent, that in the passage of this ordinance or the enforcement of it, there is or can be no such breach of trust by the corporation as will justify judicial interference.

The trust, if any, is a political one, for the exercise of which the corporate authorities are only answerable at the polls. The ordinance, if valid, is an exercise of legislative power for public purposes, and not a merely administrative act concerning the management or disposal of property which the corporation, like a private individual, may hold in trust for its constituents. In the passage of such an ordinance, the corporation acts not as a mere trustee of property, but as a local government, exercising for that purpose a part of the supreme power of the State. This rule is affirmed in the clause of the city charter (§ 139), which declares that “when any proceeding, matter or thing is by this act committed or left to the discretion or judgment of the council, such discretion or judgment, when exercised or declared, is final, and cannot be reviewed or called in question elsewhere.” The injunction cannot be allowed upon this ground.

The prevention of a multiplicity of suits is an acknowledged head of equity jurisdiction, to be exercised by injunction, either against an individual or corporation whether public or private. The case of *Ewing v. City of St. Louis* (*supra*), is sufficient on this point. The rule being shown, is this a case for its application? Will a multiplicity of suits arise between these parties, unless equity intervenes

to prevent the enforcement of this ordinance? Assuming that the ordinance is void, the complainants may pay the tax under protest and then recover it back by action at law, or may suffer their property to be sold for it and defend the possession at law against the purchaser at the sale for taxes.

If the ordinance only provided that this tax should be levied and collected once, then it might be said that the complainants had a plain, adequate and complete remedy at law, and therefore could not maintain this suit in equity. But the ordinance provides for a levy and collection of taxes to pay these coupons, once a year, for a period of twenty years. To recover them back or defend the possession of the property sold for them, will require a multiplicity of suits, and what is more, arising separately through a long period of time.

In answer to this the defendants argue that the complainants may not own this property for twenty years, and that the corporation may not levy this tax beyond the coming year. I know of no legal presumption that the complainants will part with their property, and if they should, in the meantime they are entitled to protect it, for themselves or the benefit of their successors in interest, as the case may be. They are owners in fee simple and their estate in the premises is without limit as to time.

Nor can the Court presume that the corporate authorities will cease to levy this tax after the present year, but the contrary. The complaint states that they will continue to levy it, and as they have commenced to carry out the ordinance, there is no reason to presume that they will cease to do so, unless restrained by external authority.

But this is not all; if these coupons are allowed to issue, they will pass into the hands of third persons. The trustee is directed to sell the bonds for the benefit of the O. C. R. Co. as fast as they are issued to him. The presumption is that they will be negotiable and pass by delivery. (*White v. V. & M. Railway Co.*, 21 How. 577; *Merced County v. Hackett*, 1 Wall. 95.) Whether they will show upon their

Henry Coulson *et al.* v. The City of Portland *et al.*

face the authority under which they are issued does not appear, and for anything I have been able to see in the ordinance, they need not. Innocent holders may and probably will attempt to enforce their payment against the city, and the property of the complainants will be burdened with additional taxation to meet the expense of this litigation.

Upon this ground, there can be no doubt but that this Court has jurisdiction to grant an injunction to enjoin the levy and collection of this tax, and the issue of these coupons, if the ordinance authorizing the same is illegal and void.

As the validity of ordinance 468 depends upon certain provisions in the State Constitution and laws, it is to be regretted that the Supreme Court of the State has not had occasion to construe these provisions in this respect, so as to furnish this Court an authoritative precedent upon the subject.

Complainants cite the following constitutional and legislative provisions as affecting the legality of the ordinance:

“Acts of the Legislative Assembly, incorporating towns and cities, shall restrict their powers of taxation, borrowing money, *contracting debts and loaning their credit.*” (Con. Or. Art. XI, § 5.)

“No county, city, town or other municipal corporation, by vote of the citizens, or otherwise, shall become a stockholder in any joint stock company, corporation or association whatever; or *raise money for or loan its credit to or in aid of any such company, corporation, or association.*” (Con. Or. Art. XI, § 9.)

The act incorporating the defendant—the city of Portland—was approved Oct. 14, 1864. In pursuance of section 5 of the Constitution above quoted, it provides:

“Sec. 135. The indebtedness of the city of Portland shall never exceed in the aggregate the sum of fifty thousand dollars, and any debt or liability incurred in violation of this section, whether by borrowing money, loaning the credit of the city, or otherwise, is null and void and of no effect.”

Henry Coulson *et al.* v. The City of Portland *et al.*

And further, the act of incorporation provides:

“Sec. 128. No money shall be drawn from the treasury but in pursuance of an appropriation for that purpose, made by ordinance; and an ordinance making an appropriation of money *must not contain a provision upon any other subject, and if it does, such ordinance, as to such provision, shall be void, and not otherwise.*”

Under these constitutional and legislative provisions, complainants insist that ordinance 468 is void for all or either of the following reasons:

1. That, although it pretends in the title thereof, and elsewhere, to be an “Ordinance to secure material for public buildings, and the construction and repair of streets adjacent to the public grounds, and to levy a special tax therefor,” yet that is in fact intended as a means *to raise money for and to loan the credit* of the defendant to the O. C. R. Co., contrary to Art. XI., § 9, of the Constitution of the State.

2. That such ordinance creates an indebtedness against the city of Portland exceeding fifty thousand dollars, contrary to section 135 of the act of incorporation; and

3. That, although such ordinance appropriates money, it nevertheless contains provisions on other subjects, contrary to section 128 of the act of incorporation.

The first objection to the validity of the ordinance raises a question of fact, beyond the jurisdiction of this or any other Court to inquire of or pass judgment on. True it may be, and true it most probably is, that the real object in passing the ordinance was not to secure material, etc., as stated in the title thereof, but to raise money for and loan the credit of the city to the O. C. R. Co. Yet the city has express authority to construct many kinds of public buildings, including a hospital and water works within or without the city (Char. § 38), and may pass any ordinance not otherwise unlawful, that it may deem necessary or convenient for exercising or carrying out such authority (Char. § 39). It may contract with a railway company as with an individual, unless the primary and express object of that contract be *to raise money for or loan credit to such company*. The matter

Henry Coulson *et al.* v. The City of Portland *et al.*

of constructing public buildings is committed to the judgment and discretion of the corporation legislature, and whether they act wisely or unwisely, or from good or bad motives, is not the province of a Court to inquire. It is a matter between the Council and its constituents. (Willard's Eq. 739; Char. § 139.)

It may be urged that the constitutional prohibition against *raising money* for private corporations or associations will be nugatory, if the city is allowed to deal and contract with such a corporation as with a private person; and to some extent this consequence may follow. But I apprehend a Court may more safely put some limit upon a prohibition so general as this, than to deny the city the choice of any means not expressly forbidden to it, whereby to exercise its undoubted authority.

The second objection raises the question: Can the city lawfully issue interest coupons to railway bonds, payable half yearly through a period of twenty years, and amounting in the aggregate to over \$300,000?

The charter (§ 135) seems to answer this question in the negative, when it substantially declares in pursuance of section 5 of Art. XI of the Constitution, that the indebtedness or liability of the city must never exceed in the aggregate one sixth of that sum. But the defendants insist, that as the ordinance providing for the issue of these coupons, also provides for raising revenue and appropriates it to the payment of them as they fall due, no indebtedness or liability is thereby created or incurred. In support of this extraordinary proposition they cite the single case of *People v. Pacheco* (27 Cal. 175).

This case was decided upon two grounds—the one that a law providing for the issuing of interest coupons on railway bonds did not create a debt, because, at the same time provision was made for levying taxes and appropriating the proceeds thereof to their payment; the other, that the act was passed “in case of war,” and therefore the constitutional inhibition against creating a debt did not apply. The act in question was passed during the late civil war, and the

Henry Coulson *et al.* v. The City of Portland *et al.*

soundness and sufficiency of the latter ground of the decision does not admit of question. The assembly that passed the act put the power upon that ground in the preamble thereof. Mr. Justice Rhodes concurred specially in the decision for the same reason, and as I understand him, expressly dissented from the other.

I have never been able to bring my mind to assent to the reasoning by which the Court arrived at the conclusion that the act in question did not create a debt. By means of such artificial reasoning and unlooked for construction of popular and plain terms and phrases, constitutions may be purged of every prohibition upon the legislative power of taxation and creating indebtedness, which the wisdom or fears of the people may place in them.

These constitutional provisions restraining the creation of public debts are the gradual outgrowth of the last twenty or thirty years. They have been erected by the peoples of various States as barriers against the creation of debt by the legislature in a time of popular excitement about internal improvements. In the adoption of these and kindred provisions in the Constitution of this State, the people of Oregon supposed that they were thereby putting it out of the power of the assembly and municipal corporations, to pledge the present and future property and labor of the country, for the payment or guarantee of stocks or bonds of private corporations formed for building railways and the like, for the benefit primarily of a few individuals.

To say that a sum of money due or owing from A to B, is not a debt, because A has promised to appropriate, or has appropriated, a portion of his future income to its payment, is a proposition in legal metaphysics that I cannot comprehend. A debt exists against the city whenever the city agrees to pay money in return for services or for money borrowed. Every one of these interest coupons, when issued by the mayor and auditor as presented in the ordinance, is a promise by it to pay to the holder so much money. If this is not a debt, or evidence of one, then an ordinary promissory note is not. The fact that the ordinance appro-

Henry Coulson *et al.* v. The City of Portland *et al.*

priates money to pay these coupons, as they fall due, makes no difference. There is no magic in the legislative formula—"there is hereby appropriated." That does not change the fact that the city owes these coupons, and what it owes to another is a debt due that other. Besides, there is no money in fact set apart by this formula of appropriation, until it is collected.

The ordinance, by providing for the levy and collection of taxes to pay these coupons, recognizes the fact that their issue creates a *debt* against the city, and thereby undertakes to provide means of payment. But the object of the prohibition in section 135 of the charter is to prevent the council from pledging the future resources of the city beyond the sum of \$50,000. The language of the prohibition is explicit and comprehensive. It includes all forms of indebtedness, "*whether incurred by borrowing money, loaning the credit of the city or otherwise.*" If this obligation to pay these coupons is not a debt—is not *any form* of indebtedness or *liability*—because the ordinance authorizing their issue *promises that the city will pay them when due*, then what is there to prevent the council from contracting to pay the O. C. R. Co. for furnishing material to build public buildings, etc. (always including the transportation of all city messengers), the sum of \$100,000 per annum for the next one hundred years? If the present limit of annual taxation—one and a half per centum—would raise the sum, and the ordinance so provided, and for its appropriation to that end, such a contract would be every whit as lawful as the one provided for in ordinance 468.

Again, every provision of the ordinance, except the part making the appropriation, is void, by reason of section 128, as above cited.

The idea contained in this section was taken from Art. VIII, § 7, of the State Constitution. The latter reads as follows:

"Laws making appropriations for the salaries of public officers, and other current expenses of the State, shall contain provisions on no other subject."

Henry Coulson *et al.* v. The City of Portland *et al.*

In the act of October 24, 1864, providing for contracting with certain persons for keeping the insane, a provision was inserted appropriating money to pay the contractors, as per contract. In March, 1864, on a mandamus to the Secretary of State, Mr. Justice Boise, of the Supreme Court, decided that the provision making the appropriation was in conflict with section 7, just cited, and therefore void. The prohibition in the charter against combining appropriations and other matters in the same act, is more comprehensive and explicit than that in the constitution. The former includes all appropriations and declares the consequence of its violation, namely: that all the provisions of the ordinance, except the appropriation shall be void. Under the ruling of Mr. Justice Boise (and I have no doubt of its correctness), every provision of this ordinance other than the ones making the appropriations are void. All the provisions of the ordinance directing the issue of bonds and coupons, and the levying of taxes and making contracts, were enacted in plain violation of section 128 of the charter, and are therefore invalid and of no force or effect.

This ordinance must be held void upon the double ground that it attempts to create a debt against the city exceeding \$50,000, and that it was enacted contrary to the prohibition in section 128 of the charter.

The complainants are thus shown to be entitled to the temporary injunction prayed for.

It may therefore issue, restraining the city of Portland and its officers from countersigning, issuing or paying any of said interest coupons, and from levying or collecting any tax mentioned and provided in said ordinance upon or off the property of the complainants, in the complaint mentioned, for the payment of such coupons; but such injunction must not in any manner restrain or direct the defendants in the disposition and management of the tax collected under ordinance 468, in the year 1868. So far as appears, the complainants paid their portion of this levy *voluntarily*, and they cannot now recover it back. It is no longer their

The United States v. A. S. Mercer *et al.*

individual money. It has passed into the city treasury, and become municipal property or funds. The complainants, as individuals, cannot maintain any proceeding in Court to prevent any appropriation of this money whatever. If any illegal appropriation of it is attempted or threatened, it can only be restrained upon the complaint or information of some one who represents the whole public, to whom it belongs.

John H. Mitchel, for complainants.

W. Lair Hill & Addison, C. Gibbs, for defendants.

DISTRICT COURT, DECEMBER 19, 1868.

THE UNITED STATES v. A. S. MERCER, S. B. PARRISH,
GEORGE A. LADD AND H. W. RAPPELEYE.

On an indictment for smuggling, the defendant's recognizance was forfeited for failure to appear for trial according to the condition thereof; afterwards the defendant appeared and submitted to a trial, but the jury being unable to agree, were discharged without giving a verdict; on an application by such defendant, under section 6 of the act of February 28, 1839 (5 Stat. 322), to the Court, for the remission of such forfeiture; *Held*, that it appearing to the Court that the defendant was guilty of the crime charged, and that the amount forfeited was not commensurate with the punishment deserved, that public justice required the forfeiture to be enforced.

DEADY, J. This is an application by the defendant, Mercer, to the Court, to remit the penalty of \$3,000 incurred by his bail, Levi Anderson, W. H. Gray and Philip Johnson, on account of Mercer's failure to appear for trial in May last according to their undertaking for him.

The application is made under section 6 of the act of February 28, 1839 (5 Stat., 322), which reads as follows:

"In all cases of recognizance in criminal cases taken for, or in, or returnable to, the Courts of the United States, which shall be forfeited by a breach of the condition thereof, the said Court for or in which the same shall be so taken,

The United States v. A. S. Mercer *et al.*

or to which the same shall be returnable, shall have authority in their discretion to remit the whole or a part of the penalty, *whenever it shall appear to the Court that there has been no willful default of the parties, and that a trial can notwithstanding be had in the cause, and that public justice does not otherwise require the same penalty to be executed or enforced.*"

The circumstances out of which the forfeiture arose and attendant upon it are as follows:

In May, 1867, the defendant, Mercer, having been committed by Commissioner Wilcox upon a charge of smuggling, Messrs. Anderson, Gray and Robinson became bound as his bail in the sum of \$3,000.

On July 3, 1867, Mercer and four others were indicted by the grand jury of this district, for smuggling five one eighth casks of brandy and four barrels of wine and ten of whisky, into this district from the foreign port of Victoria; and that in November, 1867, Mercer and his co-defendants, except one, were arraigned and tried upon the charges in the indictment, and the jury, being unable to agree upon the guilt or innocence of the defendants, were discharged without giving a verdict.

In May, 1868, the cause was again brought on for trial, when Mercer made default and did not appear according to the obligation of the undertaking of his bail; at the same time his three co-defendants were put on trial, and the jury being again unable to agree, as before, were discharged and a *nolle prosequi* entered as to such defendants.

On May 15, and after the default of Mercer, the United States commenced an action against Mercer's bail to recover the penalty mentioned in their undertaking.

In July following judgment was given for the plaintiffs in the action for want of answer for the sum of \$3,000 and costs and expenses—but execution not to issue thereon except by leave of the Court. This judgment was not entered until the November following.

In July, 1868, Mercer appeared in Court, and upon the motion of the United States and the counsel of Mercer, the

criminal action pending against him was continued until the November term.

In December following Mercer appeared and submitted to trial on the charges in this indictment, and the jury being unable to agree as to his guilt or innocence, was discharged without giving a verdict; and thereupon a *nolle prosequi* was entered as to Mercer.

On July 6, 1868, Mercer made application for the remission of the penalty incurred by his bail upon the grounds stated in his affidavit accompanying the application. The application was continued by the Court to await the result of the criminal action. This latter having been disposed of, the application has been heard and submitted to the Court for its action.

In his affidavit in support of his prayer for remission, Mercer states that it was his intention to have been present to answer to the indictment in May, 1868, when the second trial took place, and had made his preparations accordingly, but that he "was taken sick with the lung fever and rendered unable to undertake the journey from New York, where I had been on business to this place," (meaning Portland, I suppose); and that his absence as aforesaid was caused solely by his sickness and inability to attend as aforesaid.

From this it appears that Mercer left Oregon and went to New York after his trial in November, 1867, well knowing that his bail had undertaken that he should be here in May following, when the action was set for re-trial. To say the least of it, this conduct looks as if Mercer was willing to put his bail to great unnecessary risk, and that he regarded his obligation to be here, present in Court in May, as a matter altogether secondary to such business or speculations as he might have or find in New York. In other words, if business permitted he would return and be present, if not, then he would not. No reason, urgent or otherwise, is shown for Mercer's going to New York instead of remaining here to await his trial. Absence under such circumstances, even where sickness is shown to be the proximate cause, borders closely upon willful default.

The United States v. A. S. Mercer *et al.*

But from the statement of "Robert H. Hannah, M.D." Mercer appears to have been taken sick about April 21. This was only twelve days before he was required to be present in this Court. He could not have come here at that time in less than twenty days—certainly not in twelve. So it may be inferred that Mercer did not intend to be present, or he would have been far on the road hither, when it is said that he was taken sick in New York, and thereby detained there against his will and purpose.

The appearance of the paper purporting to be signed by "Robert H. Hannah, M.D.," is calculated to excite suspicion as to its authenticity. It bears evident marks of having been changed from a simple certificate to an affidavit. The body of it is in the handwriting of the person purporting to be Dr. Hannah. It commences, "New York, May 27, 1868. This may certify that I, Robert H. Hannah, a practicing physician in the city of New York, was called upon to visit A. S. Mercer, of Oregon," etc. Just below the signature a five cent stamp is placed and duly cancelled by Doctor Hannah, on May 27, 1868. After this was done, it appears that some one took the certificate in hand, to make an affidavit of it. For this purpose there was written at the top of the page, and in the left hand corner—"State of New York, City and County of New York." A line was then drawn through the words "This may certify that." A little further on and between the words "New York" and "was called" a carat (Δ) was placed, and the words, "being duly sworn say that I," interlined over it. On the margin opposite this interlineation are the capital letters, E. L. O., N. P., apparently intended as the initials of Edward L. Owen, Notary Public, whose official seal and signature appears below the writing, affixed to the following jurat—"Sworn to before me this third day of May, 1868." All these interlineations and additions to the original certificate, are in one handwriting. The signature of the notary is probably in the same hand, but written with a different pen and ink. The supposed notary is made to certify that he swore Robert H. Hannah to this writing on May *third*, while in

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The United States v. A. S. Mercer *et al.*

the same writing Hannah states that he *had visited* Mercer as late as May 23d.

Hannah's signature appears from the date of the cancellation of the stamp and the one written at the head of the paper, to have been made on May 27, while according to the jurat of this supposed Notary it was sworn to before him on the *third* day of the same month—just twenty-four days before. The writing is made upon a sheet of letter paper, and it is not likely that it was prepared by a notary, who would have used legal cap. It may be said that Hannah may have first prepared it as his certificate, and that afterwards he went before the notary to swear to it. This is possible, but it is quite probable that upon such application the notary would have rewritten the matter, rather than to have blotted and interlined this one, in the manner that it is. It does not contain over 100 words and the labor of rewriting it, even if more than that of blotting and interlining it, would have been but a trifle. It is not business-like or professional for a notary to put his official seal and signature to an instrument, having the suspicious appearance that this has, to be used as evidence, particularly at a great distance from where he resides.

Again the jurat does not state that the writing was *subscribed* before the notary, but only that it was sworn to before him. Any fellow might have been picked up in the streets of New York and taken before the notary and sworn to the writing. It ought to appear from the jurat that Robert H. Hannah swore to it.

These suspicious circumstances could not have escaped the notice of counsel who presented this application. Notwithstanding this, the paper has been submitted in support of the application, without a word of explanation, from which I infer that no explanation favorable to the authenticity or character of the writing could be made.

The certificate of a physician is not evidence. It is merely hearsay. A physician must give his testimony under the sanction of an oath, as in the case of men in general.

This writing then, even if admitted to be the genuine certificate of "Robert H. Hannah, M.D.," is not legal evidence of the facts stated in it. As to its being his affidavit, I have very serious doubts.

But waiving these questions and even admitting for the moment that Mercer's default was not willful, did it prejudice the United States in the trial of the cause? I am inclined to think that this question ought to be answered in the affirmative, but of this I would not be positive.

No testimony was lost between the trials in May and December, that I am aware of. But the defendants being separated in their trials by the absence of Mercer in May, the force of the case for the prosecution was weakened thereby. Upon such trial the party or parties not on trial were pointed out to the jury by the defence as a scape-goat upon which they might safely lay the whole guilt of the transaction which was the subject of the indictment. Delay is the usual defence of the guilty. If nothing else happens by the lapse of time, at least the accusation becomes stale, and of less and less public concern. Juries are not so readily or deeply affected by the moral turpitude of the transaction complained of, and are more reluctant to convict, even when the law and evidence require that they should. Honest witnesses forget many of the striking incidents and details of their story, so that their evidence loses much of its original force and effect, while dishonest and interested ones have the temptation and opportunity to exaggerate or invent circumstances to secure the acquittal of the accused.

That causes like these have worked together to prevent Mercer from being found guilty at the last trial upon some of the counts in the indictment, there is much reason to believe.

But the important question in this application arises under the words of the statute, which in effect provides, that although the default was not willful, and the United States was not prejudiced in the trial of the cause, still, *if the ends of public justice* otherwise require that the penalty should be exacted or enforced, the Court must not remit it.

The United States v. A. S. Mercer *et al.*

It appears to me, from the evidence produced on the trial of this cause before the jury, that the ends of public justice do require that the penalty should not be remitted. The end and object of public justice is to convict and punish the guilty. There can be no doubt that Mercer, while acting as deputy-collector of customs for this district, assisted some or all of the other defendants to smuggle the four barrels of wine and two of whisky into this district, as charged in the indictment.

On January 25, 1867, the steamer *Fideliter* entered at Astoria from Victoria. On her manifest there were eleven barrels of dog-fish oil, shipped at Victoria, V. I., by S. Sargent to S. Sargent, at Portland, Oregon. The manifest of cargo contained no mention of any liquors, or of any other barrels, except some barrels of salmon.

Mercer, with two inspectors, came up on the *Fideliter* to Portland. While here, he professes to have received the entry for consumption of these eleven barrels of oil by H. L. Gowan, and he certifies on such entry that H. L. Gowan came before him and subscribed and swore to the affidavit in the entry. H. L. Gowan had not power or authority to make this entry. He was not shown to have been the agent of the owner and consignee Sargent, and therefore Mercer, is shown to have violated the law and instructions in receiving the entry or allowing Gowan to make it even if it was genuine. This is a suspicious circumstance. But I cannot go over the testimony in detail. In my judgment, "H. L. Gowan" is a fiction, and no such person ever appeared before Mercer and made this entry or oath. His certificate to that effect is willfully and corruptly false. The entry is false and was probably made by one of the defendants, who filled up the printed form of entry, and signed it with the fictitious name of H. L. Gowan. Diligent inquiry has been made in this and surrounding counties for the past eighteen months for such a man as H. L. Gowan, but he has never been heard of, or shown to have ever existed.

Of these eleven barrels, imported by the assistance of

The United States v. A. S. Mercer *et al.*

Mercer as dog-fish oil, four contained wine and two whisky. They were afterwards seized, condemned and sold by the government. These eleven barrels were inspected on the wharf under the immediate supervision and with the assistance of Mercer. Two barrels, which actually contained oil, were selected for inspection, one by the inspector, with Mercer's consent, and the other by himself. The barrels when rolled on the wharf were placed on one side, and the inspection of them was delayed until Mercer directed it to be done and took part in it. Mercer had authority to inspect these barrels, but it was not his duty while the two inspectors were present. He is not shown to have inspected or participated in the inspection of any other portion of the cargo. His business was to receive the entries and collect the duties. These barrels were hauled off the wharf soon after they were inspected under the direction of one of the defendants, without any permit, written or verbal, from the deputy being exhibited or communicated to the inspectors.

The fact that four barrels of wine and two of whisky were smuggled into the district in January, 1867, is established beyond controversy by the decree condemning them as forfeited to the government for that cause. The evidence shows that six barrels seized and condemned were a part of the eleven described in the entry purporting to have been made before Mercer by H. L. Gowan, on January 28, 1867. This alone proves the entry to have been untrue—that the barrels did not all contain oil. But when we consider that the entry is in the handwriting of one of the defendants, and that no such person as H. L. Gowan exists or made such entry, the conclusion is irresistible that Mercer willfully and corruptly assisted to smuggle these foreign liquors into the district.

The statute defining this crime—act of July 18, 1866, § 4 (14 Stat. 179)—prescribes the maximum punishment at a fine of \$5,000 and ten years of imprisonment. This penalty sought to be remitted is far below the medium punishment. The crime committed by Mercer is an aggravated one, be-

In re J. J. Walton and C. W. Walton.

cause at the time, he was in the pay and trust of the government as an officer of the customs, for the purpose of preventing just such frauds upon the government.

The application for the remission is denied.

William Strong, for the application.

W. W. Page, *contra*.

DISTRICT COURT, DECEMBER 26, 1868.

In re J. J. WALTON AND C. W. WALTON.

Proof of a debt against a partnership should not be joined with proof of a debt against an individual partner.

Proof of a debt should show with reasonable certainty whether it was contracted by a partnership or the individual partners.

A claim not duly proved must be rejected; and a claim is not duly proved unless it appears from the statement of the deponent thereto, that a debt exists which the creditor has a present right to have paid out of the estate of the bankrupt.

DEADY, J. Motion by the assignee to expunge the claim of E. P. Coleman from the list of claims proved against the estate of said bankrupts.

The proof of the claims in question was made by the creditor in person, July 28, 1868. It substantially states:

That at and before the filing of the petition herein, J. J. and C. W. Walton, were and still are indebted to the deponent in the sum of \$159—balance due on a promissory note, given to bankrupt about March 1, 1868, for money loaned said bankrupts; also, that at and before the filing of said petition, C. W. Walton was and still is indebted to deponent in the sum of \$178, on account for wines and liquors sold said C. W. Walton in 1867 and 1868.

Then follows the proper allegation as to whether the deponent had received satisfaction or security for such sums or any part thereof.

In re J. J. Walton and C. W. Walton.

In conclusion the proof states, as required by the act (§ 22,) that said *claims or either of them* were not procured for the purpose of influencing the proceedings under the Bankrupt Act, and that no bargain, etc., has been made, etc., by deponent "to sell, transfer, or dispose of said *claim* or any part thereof against said *bankrupt*," etc.

The grounds of the motion are substantially these:

1. That proof is informal.

2. It does not appear from the proof whether the claim for borrowed money is intended to be proved against the individual estate of the bankrupts or against the estate of the partnership, consisting of J. J. and C. W. Walton, and known as J. J. Walton and son; and

3. It does not appear from the proof whether the claim for wines and liquors is intended to be proved against the partnership estate or the individual estate of C. W. Walton.

The first objection to the proof is well taken. Here are two distinct debts against different estates included in one proof or deposition. When parties are adjudged bankrupts, the result is or may be that several distinct estates are to be administered in that proceeding. First, there is the estate and debts of the company or partnership, and then the separate estate and debts of each individual included in the partnership. Proof of a debt against either of these estates ought not to include or be joined with the proof of a debt against either of the others. The act (§ 36) provides that all the creditors of the company and the separate creditors of each partner, shall be allowed to prove their respective debts," and that a separate account shall be kept of the partnership property "and of the separate estate of each member thereof."

The reasonable inference from these and similar provisions contained in section 36 is, that these partnership and individual estates are to be administered separately, and therefore the proof of a debt or debts against either should not be joined with the like proof against another. Besides, there is nothing elsewhere in the act or in the General Orders or Forms that countenances the contrary practice.

In re J. J. Walton and C. W. Walton.

By the second and third objections the question is raised whether the proof is sufficiently certain or not.

The claim for money loaned is not proved against the partnership of J. J. Walton and son, but against the individuals who constitute that partnership. The consideration of the debt is stated to be money loaned J. J. and C. W. Walton. The probable inference is that it was loaned to them as individuals, and that their individual estates are liable for it, but not the partnership estate—at least until the partnership debts are first satisfied. But another inference may be drawn from the statement in the proof, and from other circumstances it is highly probable that the creditor intended to prove this debt against the partnership estate. In this respect the proof is uncertain. If intended to establish a debt against the partnership estate, it should state that the firm or company, describing it by its firm name and the individuals who composed it—was indebted to the creditor, and how and for what amount. As to the claim for wines and liquors, it seems to me to be stated with sufficient certainty in this particular. It is stated that C. W. Walton is indebted to the creditor for articles sold him. This is plainly the proof of a debt against the separate estate of C. W. Walton only.

But the proof does not state that the deponent had not bargained to sell *either* of the claims stated, but only “said claim against said *bankrupt*.” This allegation, whatever was intended by the deponent, only includes one claim, and that the one against a single person. The only claim stated which answers to this description is the one against C. W. Walton. The other claim is stated to be against the bankrupts—both father and son. Then as to the claim for money loaned to J. J. and C. W. Walton there is in the proof, no allegation that deponent had not bargained to sell or dispose of it.

By the act (§ 22), the Court is required “to reject all claims not *duly proved*.”

A claim may be said to be *duly proved* when the statements of the deponent, if true, establish *prima facie* the existence

In re Max Muller and Max Brentano.

of the debt; and the present right of the creditor to payment of the same out of the estate of the bankrupt. But a claim is not duly proven when any allegation which the act requires to be made in the proof concerning it is omitted—as that the creditor has not bargained to sell or dispose of it; or where the proof is not made in conformity with the forms prescribed and the rules and practice of the Court.

The motion is allowed; let the proof be expunged.

M. W. Fechheimer, for motion.

DISTRICT COURT, JANUARY 11, 1869.

In re MAX MULLER AND MAX BRENTANO.

The prohibition of “further proceedings” in the last clause of section 40 of the Bankrupt Act, applies only to the direct proceedings upon the petition, and not to collateral proceedings by or against third persons, or even the debtor.

Under a warrant to take possession of the property of the debtor, the messenger is authorized to take such property in whosoever hands he may find it; and if by mistake, or otherwise, he should take property not belonging to the debtor, it is no ground for discharging the warrant or vacating the order for its allowance; but the party aggrieved by such wrongful seizure has his remedy against the officer making it.

Injunctions and warrants may be allowed and issued under section 40 of the Bankrupt Act without notice to the adverse party.

The Court takes judicial notice of the Acts of Congress, and they need not be set forth or referred to in any proceeding before it.

The warrant provided for in section 40 of the Bankrupt Act may issue against the *person* and *property* of the debtor, or *either* of them.

The jurisdiction of the Bankrupt Court to enjoin third persons from interfering with the goods of the debtor, or to issue a warrant to take provisional possession of them, does not depend upon the service of a debtor of a proper order to show cause why he should not be adjudged a bankrupt, but upon the filing of a petition in bankruptcy against such debtor.

A petition which states that the debtor committed the alleged acts of bankruptcy, “within six calendar months next preceding the date thereof,” and on or about a certain day therein, is sufficiently certain in this respect; and as to third persons, in collateral proceedings, the allegation is sufficient without the mention of a particular day.

The allegations in the petition concerning the existence of the debt, or the commission of the acts of bankruptcy, need not be made upon the personal

In re Max Muller and Max Brentano.

knowledge of the petitioner; but *semble*, that the deposition thereto should be made upon the knowledge of the deponent, or disclose the grounds of his belief, or the sources of his information.

The Bankrupt Act should be construed so as not to permit a petition in bankruptcy to be maintained by a creditor, who became such after the commission of the act of bankruptcy complained of.

It is sufficient if the debt of the petitioner *existed* at the date of the commission of the act of bankruptcy, although not then due.

Upon a motion to dissolve an injunction in bankruptcy against third persons, such persons cannot be heard to object to the sufficiency of the petition or the proof of debt, or acts of bankruptcy.

The Bankrupt Act is remedial, and should be construed "with a view to effect its objects, and promote justice" between a debtor and his creditors.

DEADY, J. On December 7, 1868, a petition was filed in this Court by Benjamin Price, a creditor of the above named M. and B. praying that they be adjudged bankrupts.

The claim is stated to be for goods sold and delivered to the alleged bankrupts "within the last two years past," of the value of \$3,907.

Three acts of bankruptcy are charged:

1. That said M. and B. being traders under the firm name of Muller and Brentano, and being bankrupt, etc., on November 7, 1868, sold, transferred, etc., their merchandise, accounts and assets to Baum and Wolgennant with intent to defeat, etc., the operation of the Bankrupt Act.

2. That said M. and B. on the date aforesaid, made the transfer aforesaid to B. and W. with intent to delay, defraud and hinder their creditors; and

3. That said M. and B. on November 10, 1868, paid John Anderson, one of their creditors, with intent to thereby give a preference to such Anderson, and defeat and delay the operation of the Bankrupt Act.

The proof of debt is made by the petitioning creditor, and states that the debt was due on and before November 23, 1868.

The proof of the acts of bankruptcy is made by the attorney in fact of the petitioner (who resides in San Francisco), William J. Hyland.

It states that on or about November 7, 1868, M. and B. had in store at Jacksonville, Oregon, merchandise of the

In re Max Muller and Max Brentano.

value of \$35,000, and that at the same time there was due them from solvent persons in the vicinity of Jacksonville, debts of the value of \$12,000; and that on said last mentioned date, said M. and B., with the intent and purpose alleged in the petition, fraudulently sold and transferred all their stock in trade and things in action to B. and W. aforesaid.

That said B. and W. were the cousins of M. and B., and the latter was their clerk, and without means, save a small sum due him from M. and B. for services as clerk; and that the means of Baum was not at all adequate or sufficient to make the purchase aforesaid.

That such sale and transfer was without consideration, except the small sum due Wolgennant, and that said B. and W. conspired with M. and B. by means of such pretended and fraudulent sale and transfer, to defraud the creditors of said M. and B. and defeat the operation of the Bankrupt Act.

That said B. and W. are wholly irresponsible, that they are disposing of such merchandise below its value, and at auction, and are collecting the debts due M. and B.; and if not prevented, will dispose of said property, so that the creditors of said M. and B. will receive no benefit therefrom.

That M. and B. are indebted to persons in San Francisco to the amount of about \$35,000, and to other persons in the State of Oregon, a further large sum, to affiant unknown.

That these parties all reside at Jacksonville, within a day's journey of California, and that if B. and W. are suffered to remain in possession of the property it will be disposed of, and the parties will leave the State and go beyond the jurisdiction of the Court with the proceeds; and that said M. and B. are about to depart from the State and will do so, unless prevented by the order and warrant of this Court.

On December 9, on the application of counsel for the petitioning creditor, an order to show cause—form No. 57—was allowed; and also an order directing the issuance of a writ of injunction forbidding M. and B. and B. and M.

from interfering with or disposing of the property and accounts of the alleged bankrupts, and also of a warrant commanding the Marshal to take possession of such property, and keep the same until the further order of the Court.

On December 29, B. and W. by their attorney, filed a motion to dissolve the injunction, and to discharge the property from the warrant. The motion is made upon the papers already mentioned in the case, and the affidavit of O. Jacobs, of Jacksonville.

The affiant states that he knows the parties, and that the injunction and warrant herein were served about December 15, 1868. That the goods and merchandise formerly belonging to M. and B., were at the service of said injunction in the exclusive possession of B. and W., as purchasers from said M. and B., and had been in such exclusive possession since November 7, 1868; and that said goods and merchandise were taken from the possession of B. and W. by the messenger, under the warrant aforesaid; and that they are of the value of about \$25,000.

The grounds of the motion are set forth therein as follows:

1. There was no authority for the Marshal or messenger to seize property in the hands of these parties.
2. The writ of injunction and order to take possession were issued without notice.
3. The order to take possession of goods was not made under any law of the United States.
4. The notice to show cause was and is returnable in January, 1868—a date prior to the act of bankruptcy complained of.
5. The petition fails to show at what time the act of bankruptcy was committed.
6. The charge of bankruptcy is made upon information and belief—there being no positive charge.
7. The proof of indebtedness does not show that the debt of petitioning creditor existed at the time the alleged act of bankruptcy was committed.

Counsel for the petitioning creditor objects to the hearing of the motion at this time, because, the order to show cause not being returned, there is no proof before the Court that it has been served upon the debtors.

In support of this objection, he cites the last clause of section 40 of the act. I do not think the clause supports the conclusion.

The prohibition of "further proceedings" is intended of direct proceedings upon the petition and against the debtor, and not of collateral proceedings by or against third persons or even the debtor.

The only evidence before the Court as to the service of the injunction or the execution of the warrant, is contained in the affidavit of Jacobs. Neither of these writs has been returned. The order to show cause is not returnable until January 7. The order allowing the warrant to take possession, to issue, speaks of the goods and effects of the alleged bankrupts, and not those of B. and W. The warrant, I presume, conforms to the order in this respect. I must also presume that the messenger has obeyed the warrant and taken into his possession, the goods and effects of M. and B. in whosesoever hands he found them, and not otherwise. If by mistake or otherwise he took the goods of another, he is liable to the party injured, upon his official bond. This is no more than the responsibility which the common law devolved upon every officer to whom an execution against property was directed. He had to determine at his peril what was the property of the defendant in the writ, and what was not.

Under section 40 of the act, the messenger, under the direction of the warrant, is "to take possession provisionally of *all the property* and effects of the debtor." And it makes no difference in whose hands he may find them. This is a question of fact for the officer to determine for himself, subject to his responsibility. Taking the affidavit of Jacobs, it appears that this property was in the possession of B. and W. when seized by the messenger, but it does not follow that it was not at the same time the property

In re Max Muller and Max Brentano.

of M. and B. This question cannot be made or decided upon this motion. But certainly, upon the statements in the petition and accompanying proofs, it was not the property of B. and W. and the affidavit of Jacobs, considering what B. and W. are called upon to show, rather confirms this conclusion than otherwise. The first ground of the motion is thus disposed of.

The second ground is well founded in fact, but immaterial in law. Injunctions in bankruptcy, at least when issued in the primary stage of the proceedings, under section 40 of the act, may be allowed and issued without notice. The provision in the act of March 2, 1793 (1 Stat. 334), forbidding the writ to be granted *in a suit in equity*, without notice to the adverse party, does not apply to proceedings in the District Court under the Bankrupt Act. (*Ex parte Smith*, N. Y. Leg. Obs. 291; *Ex parte Carlton*, Id. 292; cited in Bright, Fed. Dig. 456; *In re Wallace*, *Ante*, 433.) *In re Wallace* was decided in this Court, upon able argument and careful consideration. Upon further argument the conclusion seems to be sound in principle and upon authority. The rule in the judiciary act requiring notice in all cases of injunction is an arbitrary and anomalous one, and if applied to the summary proceedings under the Bankrupt Act, would in most instances render it nugatory. Notice to B. and W. of the application for the injunction in this case, would have been notice to them to leave this jurisdiction with the property or its proceeds, which they could have done, if so disposed. Doubtless the Court may require notice to be given to the adverse party, and even that the applicant shall give security for damages, whenever it thinks the ends of justice or the security of parties require it.

Possession of the goods was not taken under the order, but the warrant which issued pursuant to the order. To authorize the allowance of this order or the issuing of this warrant, notice to the adverse party was not necessary. On the argument nothing was shown in support of this objection, neither can there be.

In re Max Muller and Max Brentano.

In support of the third ground of the motion, counsel shows that the order allowing the issuing of the warrant, excepts from its operation such "goods as are exempt from the operation of the act of Congress entitled, 'An act to establish an uniform system of bankruptcy throughout the United States,' approved March 2, 1868." There being no Bankrupt Act of this date, the conclusion is, that the order for the warrant to take possession was not made under any law of the United States. This is an extremely technical objection, and admits of a sufficient and equally technical answer. The order for the warrant does not profess to be made under the act of March 2, 1868, but it only excepts from the operation of such warrant the goods exempt by that act. There being no Bankrupt Act of such date, the exemption is nugatory, and the warrant to take possession is without qualification in this respect. But the recital of the title of the Bankrupt Act in any proceeding, is mere matter of form. The recital in this order gives the date of the act incorrectly—1868—for 1867. But this immaterial mistake can in no way affect the legality of the order. The order would have been sufficient without stating the title or date of the act. The Court takes judicial notice of the acts of Congress, and they need not be set forth or specially referred to in any proceeding before it.

In support of this ground of the motion, it is also urged that the act (§ 40) does not authorize the issue of a warrant against the goods of the alleged bankrupt alone, but that the warrant cannot issue unless it be against his person, and also "to take possession provisionally of all the property and effects of the debtor," as well.

This construction of the act does not seem to me to be warranted by the language or object of the section. If the showing be such as section 40 requires, the warrant may issue against the person and goods or either of them. The greater includes the less, and neither the alleged bankrupts or B. and W., can or ought to be heard to complain that the petitioning creditor has been satisfied to take process against the goods only, because he was entitled to it against the person also.

In re Max Muller and Max Brentano.

If, in fact, the order and warrant had been for the arrest of both the person and goods, the latter might have been executed against both or either, as the petitioning creditor might direct.

The fourth ground of the motion is based upon the assertion therein, that the order to the debtor to show cause, is by mistake made returnable in January, 1868, instead of 1869. The order has not yet been returned, and there is no evidence before the Court that it is returnable at an impossible date. Nor is it apparent, if it be admitted that the order is erroneous in this respect, how the fact can in any way affect the merits of this motion. The jurisdiction of the Court to enjoin B. and W. from interfering with the goods of the debtor, or to issue a warrant to take provisional possession of them, is not dependent upon the service on the alleged bankrupts of a proper order to show cause.

As to the fifth ground of the motion, the petition avers that the several acts of bankruptcy complained of, were committed "within six calendar months next preceding the date of the petition," and on or about a certain day in November, 1868. This is sufficient; and, if it were not, to show the actual day, it certainly is, to show that they were committed within six months before filing the petition, and that therefore, this Court has jurisdiction to adjudge M. and B. bankrupts on account of them. Whether the particular day within this six months is stated or not, does not matter so far as this motion is concerned. When the alleged bankrupts appear to make defense to this petition, the question can be made as to whether the particular day is sufficiently stated, and not otherwise or before.

As to the sixth ground of the motion, it is not well founded in fact. The charge of bankruptcy is *not* made upon information and belief. The allegation in the petition is positive and unqualified as to the transfer of the stock of merchandise and book accounts to B. and W., and also the payment to Anderson, with intent to prefer him. The same is true of the deposition to the acts of bankruptcy. True, the petition states that in addition to the merchandise and

accounts, there was transferred "all the available assets" of M. and B. and this averment as to the assets is upon information and belief. This averment is a mere make-weight, and it is perfectly immaterial whether it is in the petition or not. The allegations as to the transfer of the merchandise and accounts, and of the payment with intent to give a preference, are all or either of them sufficient allegations of acts of bankruptcy. Nor is there anything in the act, or the orders and forms, or the nature of the proceeding, which requires that the allegations in the petition either as to the debt or the acts of bankruptcy, should be made upon the personal knowledge of the petitioner. The petition must be made by the creditor, and in most instances, can only be made upon information and belief. In addition to the petition there must be a deposition to the debt and the act of bankruptcy. In these it may be proper that the witness should speak from his own knowledge, or at least disclose the grounds of his belief, or the sources of his information. Much will depend upon the circumstances of the particular case.

By the seventh ground of the motion, it is asserted that the debt of the petitioning creditor was not in existence when the acts of bankruptcy complained of were committed.

Under the English Bankrupt Act, it was held that a commission ought not to be granted on the petition of a creditor whose debt was not in existence when the act of bankruptcy was committed. (1 Bac. Ab. 558.) This statute (6 Geo. 4, c 16, § 12), allowed the commission to issue upon the petition of *any* creditor or creditors of the alleged bankrupt (1 Bac. Ab. 552). The act of March 2, 1867, allows any creditor whose debt is of sufficient amount, and *provable under the act* to maintain the petition to have his debtor adjudged a bankrupt (§ 29). A debt contracted after the act of bankruptcy is provable under the act (§ 19). The letter of the English and American statutes are not materially different in this respect. Taken literally, they both would permit a petition to be maintained by a creditor whose debt arose after the commission of the act of bankruptcy complained

In re Max Muller and Max Brentano.

of. The American statute ought, I think, to be construed as the English one, so as not to permit a petition to be maintained by a creditor whose debt was contracted after the act of bankruptcy happened. This is in accordance with the decision of this Court *In re Burk* (*ante*, 425), that a creditor should not be heard to object to the discharge of a voluntary bankrupt for matters which occurred before he became such creditor. The construction is supported by the familiar principle, that no one ought to be allowed to complain of that which does not injure him. In case the act of bankruptcy was secret and unknown to the creditor at the time of contracting his debt, the rule might not apply.

The proof of debt in this case, and the petition substantially shows that M. and B., on November 23, 1868, and before, were indebted to the petitioner in the sum of near \$4,000. The petition was verified on the last mentioned date, and the acts were committed some days before in the same month. The indebtedness arose upon the sale and delivery of goods prior to, and within two years of the date of the petition, to be paid for upon request. The allegations of the petition are framed upon the idea that the debt did not become due until payment was requested, and that the commencement of this proceeding was a request. This is probably a correct conclusion in the premises. But the question is not when the debt became due and payable, but when did it commence to exist. It commenced with the delivery of the goods, or any portion of them equal in value to the sum of \$250. The proof and petition were made in San Francisco, and they are very slovenly and unskillfully prepared in this respect, as well as some others. But I think it a fair inference from the facts stated, and the nature of the transaction that the debt of the petitioner or at least \$250 of it *existed* before November 7, 1868—the date of the first acts of bankruptcy.

This disposes of the motion. It is disallowed. I have considered this motion as if Baum and Wolgennaft were entitled to make these objections. But as to the 4, 5, 6 and 7

grounds of the motion, I do not think they have any right to be heard. The questions raised on these points are between the petitioning creditor and the alleged bankrupts, and not B. and W. In the course of the argument, counsel for B. and W. have insisted that this is a special proceeding, purely statutory, and that the act must be taken most strictly against the creditor, and in favor of the bankrupt. In my judgment this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, to whom in justice it belongs. It is *remedial*, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass bankrupt laws is one of the express grants of power to the National Government; and history teaches that the want of a uniform law on this subject throughout the States, was one of the prominent causes which led to the assembling of the constitutional convention and consequent formation and adoption of the Federal Constitution.

Such a statute is not to be construed strictly, as if it were an obscure or special penal enactment, and this was the sixteenth instead of the nineteenth century. The act establishes a *system* and regulates, in all their details, the relative rights and duties of debtor and creditor. Such an act must be construed—as indeed should all acts—“according to the fair import of its terms with a view to *effect its objects and to promote justice.*”

Lansing Stout, for motion.

M. W. Fechheimer and William Strong, contra.

DISTRICT COURT, JANUARY 23, 1869.

THE UNITED STATES v. E. G. RANDALL.

The verdict of a jury regularly given is presumed to be right until the contrary appears, and should be sustained by the Court, if the evidence, by any fair construction, will warrant such a finding.

False and contradictory statements by the defendant about the material circumstances of the crime with which he is charged, are badges of guilt.

The falsification of records by the defendant, with reference to a matter in which he is charged or suspected of wrong-doing or liable to be so suspected or charged, is strong presumptive evidence of guilt.

Special circumstances not consistent with defendant's innocence, together with a particular opportunity and temptation to commit the crime charged, to be considered in support of verdict of guilty.

Section 2 of the act of March 3, 1868 (13 Stat. 500), regulating peremptory challenges in criminal cases, does not give the right to such challenge except in capital cases, because when the act was passed such right did not *exist by law* in any other cases, but was only *permitted* by rule of Court.

When it appears from the evidence that the defendant has made a false statement about the circumstances of the commission of a crime, with which he is charged, he may show that he had good reason to believe at the time the statement was true.

Gold dust in packages not weighing more than four pounds and paying letter postage, is mailable matter, and whether it is not, under section 12 of the act of July 1, 1864 (13 Stat. 337), any person employed in the postoffice who steals the same from a letter in the mail, is guilty of a crime.

The indictment in this case was found under section 12, of the act of July 1, 1864 (13 Stat. 337), and filed in this Court on November 11, 1868.

It charges that on July 28, 1868, one Thomas Smith, of Auburn, in Baker county, Oregon, deposited in the postoffice at Auburn, a registered letter numbered 36, enclosed in registered package envelope numbered 28; and that said registered letter contained 12½ ounces of gold dust, of the value of \$200, the property of said Smith, and was addressed to Yee Kang, in San Francisco, and intended to be conveyed by post to said last mentioned place.

That the defendant on August 3, 1868, was employed in the postoffice at Portland, Oregon, being then and there postmaster thereof, and that on said day, said registered

The United States v. E. G. Randall.

letter, registered and numbered as aforesaid, came into the possession of the defendant, who then and there unlawfully opened the same, and did steal therefrom the $12\frac{1}{2}$ ounces of gold dust aforesaid, contrary to the form of the statutes, etc.

On November 11, the defendant was arrested upon a bench warrant, and gave bail in the sum of \$10,000, with two sureties. On November 14, the defendant by his counsel demurred to the indictment, and for causes of demurrer specified:

1. That gold dust is not mailable matter, and the taking the same is not an offence against the laws of the United States; and

2. That the indictment contains two offences which are separate and distinct—namely, opening a letter and taking from the same an article of value.

After a cursory examination of the subject, the demurrer was overruled, with the understanding that the first question made by it could be made in arrest of judgment, if necessary. The second question made by the demurrer was abandoned on the argument, and not particularly mentioned or considered in the disposition of it.

Thereupon the defendant pleaded not guilty to the indictment. On Monday, November 23, a jury was formed in the case and heard it until the following Wednesday, when the case was given them in charge. On November 26, the jury being unable to agree, were discharged without giving a verdict. Thereupon, on motion of the defendant, the case was set for trial on Monday, January 4, 1869. On the last mentioned date, the case was, on the motion of the United States, continued until the Wednesday following, on account of the absence of a material witness.

On Wednesday, January 6, a jury was formed in the case and heard it until the following Friday, when the case was given them in charge, and on the day following the jury returned into Court, and gave their verdict that the defendant was guilty as charged in the indictment, and also recommended him to the mercy of the Court. Thereupon, on

The United States v. E. G. Randall.

motion of the United States, it was ordered that the defendant give bail with sufficient sureties in the sum of \$15,000, and that in default thereof, he be committed in close custody; and the defendant gave bail accordingly. On motion of the defendant, it was ordered that he be allowed until Monday, January 11, to file a motion for a new trial and in arrest of judgment, or either of them.

On the last mentioned date the defendant filed a motion for a new trial, for the reasons and causes following:

1. That the evidence is insufficient to justify the verdict.
2. That the verdict is against law.
3. Error of law occurring at the trial, and excepted to by the defendant, namely:
 - I. Refusing to allow defendant's peremptory challenge to Charles Sweigle, a juror.

- II. Refusing to admit the letter marked No. 3, from one Koontz, at Umatilla, Oregon, dated October 1, 1868, in evidence.

And also a motion in arrest of judgment—

Because the facts stated in the indictment do not constitute a crime in this—that gold dust is not mailable matter.

Both motions were submitted by the defendant's counsel, with an appeal for delay in the consideration of them, to give counsel an opportunity to examine the subject, and also to give time to the defendant to obtain further testimony on his behalf.

The application for delay was taken under advisement by the Court until Saturday, January 16. On the last mentioned day the application for delay was refused by the Court; and thereupon, the motions for new trial and in arrest of judgment were argued by counsel. The Court took until Saturday, January 23, to consider the matter.

DEADY, J. Before proceeding to consider the motions made by defendant, I deem it proper to state briefly the reasons for refusing the application for delay on last Saturday.

A Court will not delay judgment indefinitely in any case, merely to give the defendant time to discover, or rather to

try to discover new evidence on which to ask a new trial. Such an arbitrary exercise of power, it appears to me, would be an abuse of judicial discretion, amounting to a maladministration of justice. The defendant has not been hurried into this trial against his will and without due preparation. On the contrary, he has chosen his own time. The second trial was set for January 4, in the same term as the first, against the remonstrance of the United States Attorney, who insisted that the case should go over to the March term, according to the usual practice of the Court. At the same time, if there were any questions of law arising upon either of these motions, affecting the right and justice of the case, and about which there was room for serious doubt, it would be proper to continue the matter for further consideration and argument; and even to adjourn the case into the Circuit Court, to await the presence there of the justice of the Supreme Court, assigned to this Circuit. In the meantime, if the defendant, from any source not now apparent, should be able to discover any testimony, tending to show his innocence, he might have the benefit of his discovery on the hearing of his motion for new trial.

• With a view of giving the defendant the benefit of this delay, if it should appear there was good ground for it, the questions of law arising on these motions were carefully examined and considered. In my judgment they did not admit of serious argument or doubt. Therefore the application for delay was refused.

The motions must now be disposed of. The first ground of the motion for new trial raises the question: Is the verdict contrary to the evidence? The testimony given to the jury was sufficient proof of the following facts and circumstances:

That on July 28, 1868, one Thomas Smith, being then postmaster at Auburn, Oregon, mailed at Auburn, for himself, 12½ ounces of gold dust of the value of \$200, to Yee Kang, in San Francisco, and that Smith duly registered the letter containing the parcel of dust and numbered it 36, and enclosed the same in registered package envelope numbered

The United States v. E. G. Randall.

28, directed to Sacramento, Distributing Postoffice, Cal. That this registered package 28 arrived at The Dalles on the evening of Saturday, August 1, in good condition, and that the same was duly forwarded from thence, in the Portland pouch, in like condition, on Monday, August 3, to the office at Portland. That the mail from The Dalles to Portland was then carried by steamboat and railway, and usually arrived at Portland about the middle of the afternoon of the day on which it left The Dalles. That the mail from Portland to Sacramento was then carried in a through pouch under a brass lock, daily, and left Portland at or about 6 A. M., and then reached Sacramento in from 5½ to 6 days—the latter being the schedule time.

That on August 10, registered envelope 28 with registered letter 36 enclosed, reached the office at Sacramento in bad condition—the end of the letter and registered envelope being torn open and the contents of the former abstracted.

These, in brief, are the facts proved concerning the mailing of the letter containing the dust and the loss of the latter while being conveyed by post from Auburn, Oregon, to San Francisco, California.

The reasonable inference from these facts is, that the gold dust was taken from the letter by some one in the Portland office. Indeed, during the argument to the jury, counsel for the defendant substantially admitted this to be a correct conclusion.

Now let us see what facts and circumstances were proven concerning the question of *who* took the dust from the letter.

On August 17, the postmaster at Sacramento wrote to Mr. Quincy A. Brooks—at Portland—the special postal agent for Oregon, Washington and Idaho, enclosing registered envelope 28 and calling his attention to the matter. Owing to absence from home, Brooks did not receive this letter until about August 29. Thereupon he made minute of the affair and called upon the defendant at his postoffice, to learn what he could concerning the missing package in that office. The defendant on being requested by the agent, went

The United States v. E. G. Randall.

to his record of registered matter in transit, accompanied by the latter, and examined it, particularly the page containing the entries of packages arriving from August 1 to 7 inclusive, and could find no entry concerning envelope 28. At the same time the agent looked over the defendant's shoulder, and could not see any entry concerning the package. The defendant then told Brooks that he recollected the package and that it passed the Portland office all right. On September 4, agent Brooks sent a circular letter of inquiry (form 46) concerning envelope 28, to the postmasters on the route beginning with the one at Baker City—the first office west of Auburn—and directing each one to state in writing thereon what condition the envelope or package was in when it passed his office, if at all, and what he knew about the missing enclosure, and to then forward it to the next postmaster on the route, and so on to Sacramento, from which office the letter was to be returned by mail to agent Brooks at Portland.

In reply, the postmasters on the route between Auburn and Portland—seven in number—certified that registered package envelope 28, mailed at Auburn July 28, and directed to Sacramento, passed their respective offices in good order at the dates following—arrived at and left Baker City in mail pouch marked Umatilla, way, on July 29; passed Union on July 30; arrived at La Grande, evening of July 30, and left morning of July 31; passed Orodell on July 31; passed Cayuse on July 31; passed Umatilla on August 1; arrived at The Dalles on August 1, and left in Portland pouch for Sacramento, August 3.

This circular letter with the foregoing endorsement on it reached the defendant not later than September 19. He did not, as therein directed, at once state in writing thereon his answer to the inquiry of the agent, and then forward it to the postmaster at Sacramento. But he retained the circular letter until October 12 or 13, when he mailed it to Sacramento, first making his statement thereon as herein-after set forth.

Early in the morning of Sunday, August 2, 1868, in the

The United States v. E. G. Randall.

Blue Mountains, in the vicinity of Pelican Ranch, and a few miles west of Orodell, and about fifty miles west of Auburn, and near a one hundred miles west of Umatilla, the mail, then being carried in a stage, on the route between Auburn and Portland, was robbed by armed men. In this robbery, registered package envelopes, numbered 26 and 30, and directed to Portland, and 31 directed to Sacramento, and 32 directed to Umatilla, were torn open and their contents abstracted. The envelopes, except No. 32, came to Portland in due course of mail, without their contents, on the afternoon of Tuesday, August 4, and then passed into the possession of the agent. The one numbered 32, he soon after received. The news of this mail robbery and the opening of registered package envelopes therein, reached Portland, by telegraph from The Dalles, on the afternoon of Monday, August 3, and was published that afternoon in the *Evening Commercial*, a paper then published and circulated in Portland.

About September 6, the defendant and Brooks met in the Portland postoffice, when the defendant, without being in any way interrogated upon the subject, said to Brooks, that he thought that registered package envelope 28 had been robbed in the Blue Mountain mail robbery above mentioned. About September 18, the defendant called upon agent Brooks at his office in Portland, and asked to be shown envelope 28, and also the four envelopes which were torn open and robbed in the Blue Mountains. Brooks showed them to him and he made a minute of the examination and went away. About September 26, defendant told agent Brooks that he was satisfied that envelope 28 was robbed in the Blue Mountain mail robbery, and that he could prove it.

In reply to the inquiry in the circular letter, the defendant stated as follows:

POST-OFFICE, PORTLAND, OREGON, Oct. 3, 1868.

Reg. Pkg. Envelope No. 28 reached this office Aug. 4th; left on the morning of the 5th in locked sack marked Sacramento. Nothing unusual was noticed to create suspicion.

(Signed.)

E. G. RANDALL, P. M.

The United States v. E. G. Randall.

In this circular the word "passed" was first written and then a line drawn through it and the word "reached" written above it; and the figure 3 was first written after the word "Aug.," and afterwards the figure 4 written over and upon it.

On October 9, the defendant, without being called upon by the duties of his office so to do, voluntarily wrote to the postmaster at Sacramento as follows:

SIR: From the enclosed letters, and those of a similar nature from postmasters along the route, I have reason to believe that registered letter 36 in Pkg. Envelope 28, mailed at Auburn, 28th July, for your office, was in the mail that was robbed August 2, but which passed this office without being detected.

Yours respectfully,

(Signed.)

E. G. RANDALL, P.M.

On November 10, Thomas Smith, the postmaster at Auburn, called on the defendant at the postoffice in Portland, to inquire about registered package envelope 28, and told the defendant the amount of gold dust in it when mailed at Auburn. Defendant then said to Smith that he remembered something about the envelope going through the Portland office, but that it was torn open at the time, and he thought it did not contain any package—that the contents were gone. That he ought to have stopped the envelope and called Brook's attention to it, and that he thought he had done wrong. Smith then said, that if such was the case, the envelope must have been broken open at The Dalles, to which the defendant replied, that he did not know.

On September 19, the defendant wrote to Thomas Smith at Auburn, concerning envelope 28, and also envelopes 30, 31 and 32 which were broken open in the robbery of the mail in the Blue Mountains. To this Smith replied under date of September 26, in which he stated substantially, that envelope 28 was mailed by himself on July 28, and contained \$200 in gold dust, and that it could not have been in the mail that was robbed, unless it had been detained; and that he was afraid it had been robbed by some brother

postmaster. That envelopes 30, 31 and 32 were mailed at Auburn on July 31, 1868, and that 30 and 31 were mailed by Chinamen, and each contained \$50, and that 32 was mailed by himself, and contained \$200 in gold dust.

On September 21, defendant wrote to the postmaster at Baker City, and also to the one at The Dalles. Of the latter he asked the question—When did registered envelopes 30 and 31, mailed at Auburn July 31, pass your office? To this The Dalles postmaster replied on same sheet, by return mail—They arrived at this office on Monday, August 3, and left in Portland pouch, on Tuesday, August 4. Of the former the defendant asked the question—When did registered envelopes 28, 30 and 31, mailed at Auburn, July 28 and 31, pass your office. I desire to know if they were in the same mail. To this the postmaster at Baker City replied, on same sheet, under date of September 25, that envelopes 30 and 31 were forwarded from that office on August 1. Envelope 28 may possibly have been in same mail, but that it was entered on register of registered matter in transit on July 29, and was forwarded the day following. That 30 and 31 were entered on register on August 1, and were forwarded either the same or the following day.

The circular letter of agent Brooks and the letter of the defendant, dated October 9, and addressed to the postmaster at Sacramento, and professing to cover letters from postmasters on the eastern end of the route, reached Sacramento by mail on October 19—one month after the circular reached Portland. They were all immediately returned to Portland by mail—the circular being addressed to the agent. A few days before November 1, the agent found his circular and defendant's letter to the postmaster at Sacramento, with several letters to defendant from postmasters on eastern end of route, enclosed in an unsealed envelope, in his box at the Portland office, and addressed either to himself or defendant, he is not certain which. The agent took them into possession, and produced them on the trial.

On the circular, and at the end of the last and incomplete line of the certificate of the postmaster at La Grande, there

is written in pencil, the words—"arrived August 1, left August 2"—and at the left end of the certificate at right angles with the lines, in pencil also, the words—"left August 2." These words were not written by the postmaster at La Grande. They were not on the circular when it left Sacramento for Portland. They were on it when the circular was taken from the office by Brooks, and the writing strongly resembles that of the defendant's. The envelopes that were robbed in the Blue Mountain mail robbery, did arrive at La Grande on August 1, and departed August 2. The inference is reasonable that these words were clandestinely written upon the circular in the Portland office for the purpose of misleading the agent and others who might be engaged in the investigation, into the conclusion that envelope 28 left La Grande August 2, and was therefore robbed in the Blue Mountains, and not in the Portland office.

The presumption is that the circular was addressed to Brooks at Portland, by the Sacramento postmaster. That was the direction of the circular. But the agent found it in his box in an unsealed envelope with letters belonging to the defendant. This being so, some one in the Portland office must have intercepted the circular, and taken it out of the envelope, and after making this interpolation in, or addition to the certificate of the postmaster at La Grande, placed it in the agent's box.

In August, 1868, the defendant was postmaster at Portland, and had been for the period of near three years. At that time he had two clerks in his employ—D. F. Fox and Lyman Chittenden. The former had been in the postoffice some time, and the latter since the June previous.

The mail from The Dalles was usually opened upon its arrival in the afternoon, by Fox and Chittenden—the defendant being generally present, but seldom assisting in the opening or distribution. The Sacramento mail was made up the next morning before six o'clock, the hour of departure, by Fox and Chittenden, the defendant being very seldom present. The book containing the record of registered matter

The United States v. E. G. Randall.

in transit, was in the special charge of the defendant, and was kept by him either in his private back office in an adjoining building, or in his desk in the front of the postoffice room. At the opening of the mails, it was customary for the clerks to lay all registered package envelopes one side of the table where they were sorting the mail, and the defendant, if present, took them for the purpose of making the necessary entry concerning them in the register. If the defendant was not present, one of the clerks took them and laid them on his desk in the postoffice for the same purpose.

On November 14, agent Brooks, acting under instructions from the Department at Washington, took possession of the Portland office and official books and papers. Among these was the record of register matter in transit kept by the defendant, and examined by him and the agent with reference to envelope 28. This book the agent took into his private custody and produced it on the trial. It is not a book of the printed blanks such as the postoffice regulations require to be kept, but a common blank book of foolscap paper, ruled for the purpose. One page of it is covered with the entries made between August 1 and 7 inclusive of both dates. Only two packages are entered as arriving August 3, 1868, the one mailed at Fisher's Landing on the same day, and destined to San Francisco, and the other mailed at Salt Lake, July 14, and destined to Oregon City. Three packages are entered as arriving August 4—the first mailed at Sacramento, July 30, and destined to Sauvie's Island; the second, mailed at Rickreall, July 27, and destined to "Contract Office, Salt Lake;" and the third, mailed at Astoria, August 4, and destined to Salt Lake. No entry concerning envelope 28 is now apparent to ordinary observation, but between the two lines on which the entries are made concerning the second and third packages arriving on August 4, an entry has been made concerning envelope 28, and since erased. When attention is called to it, some portions of the entry can be distinguished and read with the naked eye, but with the aid of a magnifying glass, the whole entry can be readily made out.

The month and the day of the month of this interlined and erased entry are indicated by the use of the points or marks which are ordinarily substituted for ditto, under the word "August" and figure "4." These are not erased. Then comes the number of the envelope (28), next the place of mailing (*Auburn*), then follows the date of mailing (*the ditto marks for July and the figures 28*), and lastly the place of destination (*Sacramento*). The S in Sacramento is a peculiarly shaped letter, and bears a striking resemblance to the other capital S's in the record, and also to those in the letters of the defendant to the postmasters at Baker city, The Dalles, and Sacramento. The letter A in Auburn is not a proper capital A, but a small *a* enlarged, and used as a capital. Elsewhere in this record where *a* begins a word, it is written in the same way. The word Auburn occurs often in the record, and appears very much like the word Auburn in this erased entry. The fair inference is, that this entry was made after the one above and below it, or otherwise it would have been written *upon* a line and not *between* them, and from the same facts there is much reason to infer that the entry was not made when it purports—August 4—but afterwards. There can be no doubt but that this entry was erased after the one on the line below it was entered, for in making the erasure the tops of the capital letters in the words of Astoria and Salt Lake, in the line below, were scratched off, and have since been touched up, but as the surface of the paper was broken by the erasing, the ink used in amending these letters spread out, so that the amendments are very palpable.

These facts and inferences concerning the question who took the gold dust in the Portland office, are proven by the evidence of the prosecution, except the letter of the postmaster at Baker city to the defendant in reply to his, which was introduced by defendant.

On the trial, neither party cast any suspicion upon Chittenden, but the defendant insisted that Fox *alone* committed the crime with which the former was charged. Upon this

The United States v. E. G. Randall.

question other evidence was introduced by both parties, which I prefer, for the present, to state substantially, rather than to say what facts were or were not proven by it.

On Thursday, November 12, the Judge of this Court, upon the application of the United States Attorney, issued a warrant for the arrest of Fox as a material witness for the prosecution in this case, under section 7 of the act of August 8, 1846 (9 Stat. 73). On the same day, Fox gave bail to appear as a witness in the case in the sum of \$5,000, with two sureties, one of them being his wife's brother, Dr. Jacob S. Giltner. Before daybreak the next morning, the other surety in the undertaking of bail surrendered Fox, and he has remained in the jail of this county, as a witness, ever since.

Putnam Smith, a broker, being called by the defendant, testified, that on August 6, 1868, he purchased of some one, he did not know who, 12 ounces and six pennyweights of gold dust, for which he gave \$15½ an ounce. That he made an entry in his book of the purchase at the time, as of "mixed dust," by which he meant dust taken from different camps or diggings; and that he bought dust once of Fox, but could not say when or what amount. He could not say that it was in August, but thought it must have been before the State Fair at Salem, in 1868, and that nothing was said by Fox as to where he got the dust. That on November 10, Fox came into his place of business and placed the following letter, enclosed in a sealed envelope and addressed to Put. Smith, on his desk, and went out without saying a word, O. B. Gibson being in the room at the time:

"PORTLAND, Tuesday morning—Mr. Put. Smith, Dr. Sir: Randall tells me that that Regt. Package affair, has been taken before the Grand Jury. When called upon I must clear everything. *Need I fear anything?* Drop me a line, good Put., and oblige. Yours, to serve always"—without any signature.

That this letter was written by Fox, was not seriously questioned. Being the statement of a person out of Court,

The United States v. E. G. Randall.

and not a party to the action, it was not admissible in evidence upon the trial of the defendant, but when offered by the defendant, the prosecution consented to its being read to the jury, and it was read accordingly.

In answer to the testimony of Putnam Smith in regard to the purchase of gold dust, the prosecution proved by Thomas Smith that the gold dust stolen from envelope 28 was placer dust of superior quality and all from one diggings.

To show the guilt of the defendant, either singly or in conjunction with Fox, the prosecution called as witnesses, the wife of Fox and her brother, Dr. Jacob S. Giltner. The former testified, that a few days after the indictment was found and after Fox had been surrendered by his bail, she visited the defendant to ascertain if he was a friend of her husband's. In this conversation the defendant said to witness that if Fox would do as he had agreed or as his friends said he would, that defendant and his friends would be Fox's friends, but that if not, he could not expect any help from him. That gold dust was not mailable matter, and stealing it from the postoffice was not a crime. That defendant was not guilty and would be cleared. That Fox would be in trouble about it but a little while, as defendant had influence with the senators and would get him pardoned immediately.

On the cross-examination this witness, when asked if defendant did not say, that if Fox would come out and tell the truth about it, the defendant and his friends would be Fox's friends, answered, yes. When asked again by the prosecution to state in her own words what defendant said to her in this particular, she replied substantially as at first—that if Fox would do as he had agreed or as his friends said he would, etc. The examination and cross-examination on this point was carried on some time without any change of result, the witness continuing to state on the examination what she did at first, and on cross-examination to answer yes to the interrogative statement of defendant's counsel.

Giltner testified that in the night of November 12, de-

defendant came to his office and said that Fox had confessed, and that he had better leave on the steamer for Victoria and from there he could get to the Sandwich Islands. That witness had better get Fox out of the way, as it would be a disgrace to witness, his brother-in-law. That witness had better get Fox off on the steamer, and that one going to leave that night at four o'clock. Witness declined to follow defendant's advice, saying that he could not afford to pay Fox's bail of \$5,000, and that he wanted him to tell the truth about it. Defendant then said to witness, that gold dust was not mailable matter, and that the case would be taken out of the United States Court; but if this failed, then defendant and witness with their influence with Senators Williams and Corbett could get Fox pardoned.

The defendant proved that neither the Wright nor Active were in this port on November 12, and that at that date no other steamers were running between this port and Victoria; and also that the defendant had maintained a good reputation for honesty in this community, in which he had lived for several years before this charge was made.

On the evening of Thursday, January 7, at the close of the testimony, the defendant offered to read in evidence, for the purpose of impeaching a witness called by the prosecution; what purported to be the record of the conviction of one Jacob Giltner of a crime of counterfeiting, at Danville, Pennsylvania. The reading of the paper was objected to, because it lacked the certificate of the presiding judge to the attestation of the clerk. The Court took the matter under advisement until the next morning, when counsel for the defendant asked leave to withdraw the offer to read the paper, which was allowed.

This is the case upon which the jury found the defendant guilty, and now the Court is asked to set their verdict aside. If it is contrary to the evidence it ought to be set aside, but not otherwise. A verdict without evidence or against evidence, ought not to be allowed to stand in any Court or case, but a verdict which is warranted by *any fair construction* of the testimony ought not to be set aside, although the

The United States v. E. G. Randall.

Court upon the same evidence would come to a different conclusion.

The *United States v. Martin* (2 McLean, 261), was an indictment under the same statute substantially as this. The defendant being a mail carrier, was indicted for embezzling a letter from the mail bags in his custody containing bank notes. The evidence was wholly circumstantial, but the defendant was found guilty. A motion was made to set aside the verdict because it was contrary to evidence, which was denied, and the defendant sentenced to ten years imprisonment. In considering the motion, Mr. Justice Holman, delivering the opinion of Court, says:

“In reviewing the verdict of a jury regularly given, the verdict must be presumed to be right until the contrary appears, and *it should be sustained by the Court, if the evidence, by any fair construction, will warrant such a finding.* A Court is not authorized to set a verdict aside simply because, if they had been on the jury, they would have found a different verdict. It is not sufficient that the verdict may possibly be wrong, but that, after giving a proper weight to all the evidence, it cannot be right.

“This verdict is given on what is called circumstantial evidence, and the Court feel disposed to give due weight to the arguments which have been drawn from reported cases, where innocent individuals have been convicted and punished for supposed crimes, which were never committed or committed by others. These arguments show the necessity of extreme caution in convicting on circumstantial evidence, but do not prove that circumstances may not be sufficiently strong to authorize a conviction, or that circumstances are not to be relied on in proof of guilt. If a train of circumstances are not deemed sufficient to produce conviction, the penal laws in relation to many offences, especially those against the postoffice regulations, would be a dead letter.”

This is good law and sound sense, and the circumstances of the case in which it was delivered, make it particularly applicable in this case.

This verdict was fairly given. There had been a former

trial, so that the defendant was well informed of the nature of the evidence and arguments which would be used against him. He has had every facility and aid in making his defence that able counsel, wealth, zealous friends and position could give him or command. The jury were strangers to him, and as a whole as intelligent and respectable as I ever saw in this State or elsewhere.

Notwithstanding the proof, it is possible that the defendant is innocent. But absolute certainty is not required or attainable in matters depending upon human testimony or judgment. Moral certainty is all that is expected in the verdict of a jury. It will not be denied but that the circumstances proven point to the conclusion that either the defendant or Fox committed this crime singly, or that they were accomplices, and committed it together. The jury, having come to either of two of these conclusions, must have found the defendant guilty. They were the judges of what facts were proven, and of the proper inference to be drawn from them respecting the guilt or innocence of the defendant. This Court cannot say that in deciding these questions they were clearly wrong, or that they acted contrary to the evidence, and therefore it ought not to disturb their verdict. Indeed I am constrained to think that the most reasonable conclusion from the facts and circumstances proven is, that the defendant, either alone or with the assistance of Fox, committed the crime.

Consider for a moment the extraordinary and inconsistent conduct of the defendant concerning the package from the time it reached his office until the time of his indictment and arrest. By the postoffice regulations he was required to register every registered package envelope that passed his office, and note its condition. If anything unusual appeared about the package, it was made his duty to notify the postal agent of it at once. According to the division of labor in the Portland office, the keeping of this register was the business of the defendant. No entry was made of the transit of this package through the office. This, although a circumstance to be considered, of itself concludes nothing. The defend-

The United States v. E. G. Randall.

ant may have failed to register the package from mistake or carelessness, or it may not have reached his hands or come to his knowledge. But in any event, when called upon to give information concerning the matter, by the postal agent, he was required to tell the truth, and nothing but the truth, so far as he knew, and the presumption is that an innocent man would.

On August 29, defendant said to Brooks, that he recollected the package and it passed the office all right.

On September 6—That he thought the package was robbed in Blue Mountain mail robbery.

On September 26—That he was satisfied that package was robbed in Blue Mountain mail robbery, and that he could prove it.

October 3, in writing on the circular letter—That the package reached the Portland office on August 4 and left on August 5—nothing unusual was noticed to excite suspicion—which was equivalent to certifying that the package passed in good order.

October 9, in a letter to postmaster at Sacramento—That he had reason to believe that package robbed in Blue Mountain mail robbery on August 2, but passed Portland office without being detected.

November 10, to Thomas Smith—That he remembered something of the envelope going through the Portland office, but that it was torn open at the time and he thought contents abstracted.

Here are six different statements about this package, made by the defendant, not casually or inadvertently to strangers or unconcerned persons, but with more or less deliberation to officers of the postoffice department and the owner of the stolen dust, all of which were, as a matter of fact, false, and involved three different and irreconcilable accounts of the matter. The certificate endorsed upon the agent's circular was a deliberate official act in writing, done upon the requirement of a superior officer and under the solemn sanction of an official oath.

There never was any ground for the defendant's believing

The United States v. E. G. Randall.

or saying that the package was robbed in the Blue Mountains. On the contrary, at the time he made his certificate on the circular and wrote to the postmaster at Sacramento, he had positive evidence before him, in the letters from postmasters on the eastern end of the route and their official certificates on the circular, that the package reached Umatilla on Friday, July 30—two days in advance of the mail that was robbed and near a hundred miles west of the place of the robbery. The defendant's efforts to put the agent and the Sacramento postmaster on this false scent, betrays a consciousness of something wrong, and a fear of the truth.

The package did reach the Portland office on August 3, and of this there can be no doubt. So the defendant, acting apparently under the influence of the fact, first wrote in his certificate. Afterwards he altered the date to August 4, so as, apparently, to make it possible that the package might have been in the mail that was robbed. The certificate should have stated the truth known to the defendant that his official register contained no entry of the package.

These contradictions and misstatements and attempts at misleading the officers and person intrusted are all badges of guilt.

But this is not all of the defendant's statements about the package. On the former trial, J. H. Koontz, the postmaster at Umatilla, in August, 1868, testified that in October he had a conversation with defendant upon the subject of registered package envelope 28, when the defendant said, "He remembered about the package, but had no note of it in his office, and that he thought contents either dropped or taken out at The Dalles."

True, this testimony was not given to the jury that found this verdict, because the witness was unable to attend this trial on account of sickness. But in a motion to set aside a verdict and grant a new trial, it is proper to consider all the testimony that appears to exist in the case.

Then we come to the interlineation and erasure concerning envelope 28 in the record of registered matter in transit,

kept by the defendant. This was an entry after the fact, and therefore suspicious. It was not in the book when examined by the defendant and Brooks on August 29, although it should have been made for nearly a month previous. The defendant then said there was no entry in the register concerning the package, and agent Brooks looking on, over defendant's shoulder, saw none. The entry must therefore have been made long after the package arrived at the office, and after the inquiry had been set on foot as to what had become of it and who had stolen it. The register is an official book and kept for the public and subject to public inspection. The defendant is bound only to make true entries therein and those to be made contemporaneous with the fact to which they relate. He has no right to destroy the book or erase entries once made in it. The falsification of records, either by interlineations or erasures, with a reference to a matter, in which the party making such falsification, is suspected or charged or liable to be suspected or charged with neglect or wrong-doing, is strong presumptive evidence of guilt. This interlineation was a change of the record—an afterthought, as an answer to the suspicions which the defendant must have seen, were pointing towards his office as the place of the theft of the package. The erasure was another afterthought, so as to make the record comport with the later explanations of the defendant—that the package had been torn open and lost its contents or been robbed of them east of Portland. Such a statement would be flatly contradicted by the entry that the package had arrived in good order. Therefore it was erased. This, of course, was in legal effect and office understanding an entry of arrival in *good order*—because the entry said nothing to the contrary. That this interlineation and erasure were made by the defendant the jury might fairly presume from the fact of his having the special custody of the book, and it being his special business to make the entries therein. But the fact that sufficient remains of the entry, to show that it was in the handwriting of the defendant, puts the matter beyond dispute.

The United States v. E. G. Randall.

It being shown to a moral certainty that the envelope arrived at the defendant's office with the package of gold dust, and that the latter was abstracted from the envelope while there, the circumstances of the false and contradictory statements of the defendant concerning the package, and the interlineation and erasure of the entry relating to it, were sufficient to authorize the jury to conclude, that the defendant, either alone, or with the assistance of Fox, stole the dust.

As to the testimony of Mrs. Fox and Dr. Giltner, I have not taken it into account in the foregoing consideration. The jury within their power of judging of the credibility of a witness, and the true import of conversations which are based upon prior conversations, or occurrences known to both the witness and defendant, but only incidentally or imperfectly shown to them, might have fairly drawn some conclusions from the testimony of these witnesses, none of which would tend to show the defendant's innocence, but the contrary. For instance, the conversation between defendant and Mrs. Fox indicates that already some friends of the defendant had been trying to induce Fox to take upon himself the whole guilt of the crime, and thereby save the defendant harmless. In return, the defendant, by himself and friends, was to save Fox from actual punishment, either upon the plea that gold dust was not mailable matter, or by procuring him an immediate pardon. The interview between the defendant and Giltner points to the same conclusion. If the defendant was conscious of his own innocence and of Fox's guilt, the most natural and proper course for him to have pursued was to have complained of him, instead of furtively bargaining for Fox's testimony on his own behalf, upon the promise of procuring the former an immediate pardon—a promise which the defendant had neither the right to make nor the power to perform.

It is also proper to consider the fact that the robbery of the mail on August 2, was known to the defendant about the hour that envelope 28 came to his office. This may have suggested the feasibility of abstracting the contents of this

envelope, and escaping detection by attributing the loss to the robbery. In pursuance of this plan, the envelope when relieved of its contents, would be detained over the next day, August 4, and started for Sacramento on August 5, so as to arrive at the latter place, in point of time, as if it had been in the mail that was robbed in the Blue Mountains. The accompanying "Return registered letter bill" would be detained also, so as to keep company with the registered envelope. This was easily done. There was no other envelope arrived at Portland in the mail of August 3, directed to Sacramento distributing postoffice, but No. 28. The return bill enclosed in a common envelope and similarly directed would necessarily be the one which related to envelope 28. This theory accords with the fact as to when the plundered envelope and return bill arrived at Sacramento. The usual time then occupied in making the trip between Portland and Sacramento was $5\frac{1}{2}$ days. The schedule time was six. The envelope and letter bill reached Sacramento about one o'clock P. M. of August 10. If the envelope and letter bill had left Portland at six o'clock A. M. of August 4, then it would have been $6\frac{1}{2}$ days on the way—more than the schedule time, and a full day more than the usual time. But supposing that they left in the mail of the morning of August 5, then the time consumed in the transit would be the usual time, at that season— $5\frac{1}{2}$ days. It being morally certain that envelope 28 and the return letter bill reached the Portland office, in good order, on the afternoon of August 3, and that they reached the Sacramento office, with the contents of the former abstracted, on the afternoon of August 10—after a period of $6\frac{1}{2}$ days—it is a very reasonable conclusion, not only that the envelope was robbed in the Portland office, but that it and the letter bill were detained there for that purpose and on that account, from the morning of August 4 to that of August 5.

The letter of Fox to Put. Smith, to say the least of it, is evidence of more or less conference and confidence between the defendant and Fox on this subject. It would seem that they had a common interest in, or knowledge of the matter.

The defendant seems to have been watching the action of the grand jury then in session engaged in the investigation of crimes, and the accusation of criminals. At this time, if defendant was wholly innocent, he must have been satisfied that some one in the office was guilty. He retained Fox in his employ—made no complaint against him—but communicated to him the private intelligence that the matter was to be taken before the grand jury, which the latter, in turn, hastened to communicate to the receiver of the dust, and ask his advice in the premises. This scrawl, read by the light of all the other facts in the case, indicates that Fox knew of this theft, and probably had been used as a tool to dispose of the stolen dust.

Besides all these, there are other circumstances which tend to support the hypothesis of the defendant's guilt. His detention of the circular letter for nearly a month, instead of answering the question propounded and sending it forward at once to Sacramento. He was not charged with the investigation of the matter, but was asked a question concerning his own office. If he knew nothing about the envelope, and there was no entry in the register concerning it, he should have certified so at once. Impliedly his certificate asserts that there was an entry concerning the envelope in his register, when there was not, unless it be the interlined and erased one. The letters which the defendant wrote to the postmasters, appear to have been written with a design to suggest that envelope 28 was in the mail robbery of August 2. The very fact that defendant stepped out of his sphere to write them at all, tends to show that he had some fear that if the investigation was left to the postal agent, it might not result as he, the defendant, desired it to do.

In the motion for a new trial, no objection is made to the ruling of the Court refusing to allow Fox's statement out of Court, to be given in evidence. But in the argument of the motion and everywhere else, we are met with the plea that Fox has confessed the theft, and the defendant is not guilty. The fallacy of this must be apparent to every who will dispassionately consider the matter for a moment. If Fox's

admissions could be given in evidence to prove the defendant's innocence, when Fox was placed on trial he might show that these admissions were false, and were made for the purpose of wrongfully procuring the acquittal of this defendant, or he might show that he was many miles from the place when the crime was committed, and therefore it was physically impossible for him to have committed it. Upon the trial of defendant, Fox's statement out of Court are mere hearsay. Besides Fox might confess his guilt in pursuance of an agreement with the defendant's friends, for the purpose of procuring the acquittal of defendant, for a consideration, or when in fact they were both guilty. Fox was the best witness as to what he knew, and if the defendant wanted it to go to the jury, he should have called him as a witness. On the first trial this was done. Fox answered all the questions asked him by defendant except two, which he declined answering on the plea that the answers might criminate himself. These questions were—Whether any package of gold dust came down in the mail bags from The Dalles about August 1? and, Whether he had any gold dust transactions with Put. Smith? For aught that appeared, this might have been a mere pantomime, enacted before the jury, in pursuance of a previous agreement, for the purpose of leading their minds to the conclusion that Fox was guilty, and the defendant not. To prevent this, the Court instructed the jury that the defendant was on trial and not Fox, and if Fox declined to answer a question, as he might, no inference was to be drawn from the refusal, either for or against the defendant. On the second trial the defendant called Cartwright, the District Attorney, as a witness, who swore that since the first trial, he had promised Fox, that if he would tell all he knew about the theft, and he should be satisfied he told the truth, he would make him a Government witness, and he should not be prosecuted. For this reason the defendant declined to call Fox as a witness on the second trial, and the prosecution being satisfied to submit the case to the jury without his testimony, he was not examined at all. But counsel for the defendant, while

The United States v. E. G. Randall.

acknowledging the correctness of the general rule laid down by the Court on the question of admitting Fox's outside statements to the jury, on Randall's trial, still indirectly complain that they were not permitted to do so; even when they declined to call him, and let the jury hear his account of the matter, given under the sanction of an oath, and in the presence of the defendant. Either Fox would tell the truth as a witness or not. If he would, then the failure of the defendant to call him, gives reasonable ground to presume that his testimony would tend to convict the defendant. If, however, the defendant had reason to believe that Fox could not be trusted to tell the truth on the witness stand, then certainly, and independent of the fact that they are mere hearsay, the defendant ought not to ask his admissions or statements made out of Court without the sanction of an oath to be received in evidence—admissions made too in pursuance of a promise from the defendant and his friends, to save Fox from punishment if he should get convicted himself on account of them.

The second ground of the motion for a new trial—that the verdict was against law—was not argued by counsel and needs no particular consideration by the Court. Indeed, I am not certain as to what question is intended to be raised by it. The charge to the jury was in the main oral, and time will not permit its being written out now. No exception was taken to it by either party, and I understood from defendant's counsel that the defence was well satisfied with it. The verdict is not against the law given the jury by the Court, for under the charge the jury were at liberty to find the defendant guilty or not guilty, according as the facts and the proper inferences from those facts might in their judgment require.

The first error of law alleged to have occurred at the trial, was the refusal of the Court to allow the defendant's peremptory challenge to Charles Sweigle, juror.*

According to the rules and practice of this Court, established since 1864, by the adoption of section 155 of the Crim. Code (Or. Code, 467), the defendant was entitled to

The United States v. E. G. Randall.

six peremptory challenges, and no more. Before challenging Sweigle, the defendant had challenged peremptorily six jurors, which challenges had been allowed. At common law, strictly speaking, a peremptory challenge to a juror was not allowed in any case. But in progress of time a practice grew up to allow them, in favor of life, in capital cases. Beyond this, peremptory challenges were not allowed at common law.

In modern times, in most of the United States, the practice or law has gone to the other extreme, so that the number of peremptory challenges allowed a defendant enables him, in many cases, to form a jury that is morally certain to acquit or least to disagree.

By section 30 of the act of April 30, 1790 (1 Stat. 117), peremptory challenges in United States Courts are limited to treason and other capital cases. The laws of the States allowing peremptory challenges in other cases do not apply, unless made a rule of Court. (*United States v. Cottingham*, 2 Blatch. C. C. 470.) The case last referred to arose under section 21 of the act of March 3, 1825, substantially the same as this. A clerk in the Albany postoffice was indicted for opening a letter and stealing therefrom. The Court, Mr. Justice Nelson presiding, held that the defendant was not entitled to any peremptory challenges under the laws of the United States, nor under the law of the State of New York, as the latter had not been adopted by the Court. On March 3, 1868, an act was passed, "regulating proceedings in criminal cases and for other purposes" (13 Stat. 500). The second section of this act provides, that in capital cases the defendant shall have but twenty peremptory challenges, and the United States five; and, also, that "in a trial for any other offence in which the *right of peremptory challenge now exists*, the defendant shall be entitled to ten and the United States to two peremptory challenges."

Heretofore this Court has always construed this statute as not extending the right of peremptory challenge to any case not capital, on the ground that the *right* could not be said to *exist* when it was not given by law, but merely depended

The United States v. E. G. Randall.

upon a rule of Court. If otherwise, then this act, instead of establishing an uniform rule upon this subject, which appears to have been the object of it, would allow peremptory challenges in this State, because there is already a rule of Court allowing them here, and exclude them in New York, because there is not such a rule there. This provision of the statute is evidently founded upon a misapprehension of the subject, and is nugatory. The question is a technical one and the decision of it in no way affects the justice of the case.

The second error of law alleged to have occurred on the trial, was the refusal to admit in evidence a letter of October 1, 1868, written by J. H. Koontz, and addressed to the defendant. Koontz was postmaster at Umatilla in the early part of August, 1868, but his brother, J. A. Koontz, was his deputy and performed the duties of the office. J. H. Koontz wrote the letter sometime after he had ceased to be postmaster. He was a witness at the former trial, but absent at this on account of sickness.

The letter was offered in evidence to show that the defendant, when he wrote to the Sacramento postmaster under date of October 9—had reason to believe that envelope 28 was in the mail that was robbed August 2—did have a reason so to believe at that time, even if it was a mistake. The right to introduce this letter to show that fact was rested on the ground that this Koontz letter was enclosed in the letter to the Sacramento postmaster, and therefore entitled to be read as a part of that admission of the defendant. The Court ruled that the defendant might read to the jury any letter that was enclosed in the one to the Sacramento postmaster, because the prosecution having read that to the jury the defendant was entitled to read the other as a part of the same statement or admission. The Court also ruled, that any letter which the defendant sent the Sacramento postmaster with his of October 9 as the ground of his belief therein mentioned, might be read to the jury to show how far the defendant was warranted or justified in expressing the opinion or making the statement to the Sacramento

The United States v. E. G. Randall.

postmaster that he did, but that information or letters not mentioned or disclosed at the time of making a statement in regard to envelope 28, could not be read by the defendant to the jury.

Taking these rules as a guide in the premises, the Court refused the Koontz letter to be read to the jury, because it did not appear from the testimony that it was enclosed in the defendant's of October 9, addressed to the postmaster at Sacramento. This is the only ruling made in the case that upon reflection I am not satisfied with. The difficulty was in the facts and not in the law, and grew out of the indistinctness of the testimony as to what letters reached Sacramento with the defendant's, or in it; and as to how the letters of the defendant's were returned to the Portland office and came into Brooks' box. Lewis remembered but two letters in the Sacramento postoffice with the defendant's, and this is not one of them, though he knew there were others; and it might have been placed in the open envelope in Brooks' box by the defendant, without having been to Sacramento at all. Yet I am inclined to think that it would have been safer to have inferred that it was one of the inclosures in the defendant's letter, from the fact that it was found in company with it in Brooks' box after the return of the latter from Sacramento. But if this were an error of judgment, I am satisfied that it worked no possible harm to the defendant. It will not be contended that this letter in any way bears directly upon the question of the defendant's guilt or innocence. It was only offered to qualify the effect of a circumstance from which, with others, the jury were asked to infer the defendant's guilt. In other words, it was offered to prove that the defendant had good reason or some reason to write the postmaster at Sacramento that he believed envelope 28 was in the mail robbery of August 2, and therefore we are not to infer, because the envelope was *not* in the robbery, that he was telling a willful falsehood for the purpose of putting the department on the wrong scent, and keeping the pursuit from himself.

But the letter from J. H. Koontz does not show that en-

The United States v. E. G. Randall.

velope 28 was in the robbery of August 2, nor furnish any reason or ground for the defendant thinking or saying so. Here is the letter:

“POSTOFFICE, UMATILLA, Oregon, Oct. 1st, 1868.—To E. G. Randall, P. M., Portland. Dear Sir: At the request of the P. M., I write you in answer to yours of Sept. 21. Reg'd Pkg., envelope No. 28 came to this office on the 1st of August, being Saturday, and left in the mail on Monday at the same time that those four packages left that were broken open and robbed on the morning of the 2d of Aug. The mails that arrive at this office Saturday lay over till Monday, and in the meantime, on Sunday evening, another mail from east arrives, and both go down on Monday. I can't say certain that all went down in the same lock-sack, but such might have been the case, as we were sometimes compelled to put both mails together, in order to keep sufficient sacks to go on the two routes above, namely, Wallawalla and Boise City. So No. 28, mailed at Auburn July 28, left this office August 3.”

Now this letter says that envelope No. 28 reached Umatilla Saturday, August 1, and that the mail robbery took place on Sunday, August 2, in the Blue Mountains, near one hundred miles east of Umatilla. Can any one pretend that this is authority or even a decent excuse for the defendant's writing to the Sacramento postmaster that envelope 28 was in the mail that was robbed in the Blue Mountains of August 2? Certainly not. Besides, the defendant had made this statement to Brooks before he had any of these letters. Again, at the time the defendant wrote this letter to the postmaster at Sacramento, he had all the official statements of all the postmasters on the route before him, on the circular letter. These all concluded in stating that envelope 28 was two days ahead of the mail that was robbed, and that it left The Dalles for Portland in good order on the morning of August 3. This Koontz letter is a mistake in regard to envelope 28 not leaving Umatilla until August 3. It left on Saturday morning, August 1, and went to The Dalles by land. On the last

trial, Koontz explained it in his testimony. The mail leaves Umatilla six times a week for The Dalles—Mondays, Wednesdays and Fridays by water, and Tuesdays, Thursdays and Saturdays by land. It comes up on opposite days. For instance, the land mail comes to Umatilla from The Dalles on Friday evening, and returns on Saturday morning, but not until the eastern stage comes in—which often comes in in the night. The mail is made up for The Dalles the next morning, and a letter that came in from La Grande on Friday evening, July 31, would be entered on the register as of Saturday, August 1, and go in The Dalles the same day. This was the fact in regard to envelope 28. J. H. Koontz was the postmaster, but his brother attended to the business, and when he wrote this letter, some time after he went out of office, he saw envelope 28 was registered on Saturday, August 1, and he inferred that it came on the evening of that day, and as there was no mail carried on Sunday, he rightly concluded from these premises, that it left for The Dalles on Monday, August 3, in same mail with robbed packages, but he was mistaken in his premises. But, be this as it may, the letter so far from countenancing the opinion that envelope 28 was in mail robbed in the Blue Mountains on August 2, shows directly the contrary—that the envelope was in Umatilla on August 1, from twelve to twenty-four hours ahead of that mail.

The motion for a new trial is overruled.

As to the motion in arrest of judgment, a statement of the statutes in regard to the matter and a few comments will dispose of it. Section 12 of the act of July 1, 1864 (13 Stat. 337), re-enacting section 21 of act of March 1, 1825 (4 Stat. 107), provides:

“If any person employed in any department of the post-office establishment, etc., shall secrete, embezzle or destroy any letter, packet, etc., with which he or she shall be intrusted, or which shall have come into his or her possession and intended to be conveyed by post, etc., such letter, packet, etc., containing any note, bond, draft, check * * or other article of value, etc., or if any such person, etc.,

The United States v. E. G. Randall.

shall steal or take *any of the same* out of any letter, packet, etc., such person shall, on conviction of any such offence, be imprisoned not less than ten years, not exceeding twenty-one years, etc.”

Tried by this definition, the act committed by the defendant was a crime. The defendant was a person employed in the postoffice. Envelope 28 came into his possession and was intended to be conveyed by post. It contained an article of value—12½ ounces of gold dust—and the defendant by the verdict of the jury is found to have taken the same out of such envelope or letter therein. Even if the statutes defining mailable matter do not include gold dust in the category, still the taking or stealing it from a letter in the mail by a person employed in the postoffice would be a flat violation of the section just read, and a crime. It does not follow that because an article is not enumerated as mailable matter that therefore it can be stolen from the mails by those interested with their conduct and transposition, with impunity, or in the pithy language of counsel for the United States, “because gold dust is not *mailable*, it does not follow that is *stealable*.” As argued by counsel for defendant, a postmaster might object to being responsible for articles not permitted to be carried in the mails, but no one should object that he is prohibited from stealing from the mails, whether the article be rightfully there or not.

Section 16 of the act of March 3, 1863 (12 Stat. 704), provides: “No postmaster shall receive to be conveyed by the mail any packet or package which shall weigh more than four pounds, except books published and circulated by order of Congress.”

The reasonable inference from this section is, that the mailability of matter depends upon its weight, and not its kind or quality. To the same effect is section 25 of the same act, which reads:

“On all matter not enumerated as mailable matter and to which no specific rates of postage are assigned, and which *shall nevertheless be mailed*, the rate, if *the same shall be forwarded*, is established at the rate of letter postages.”

The United States v. E. G. Randall.

Section 456 of the postoffice regulations prescribes:

“*Money and other valuables*, sent by mail are at the risk of the owner, but in case of loss the department will endeavor to discover the cause, and where there has been a theft, to punish the offender.”

These instructions being promulgated by the Postmaster General, under authority of an act of Congress, have the force of law. Section 32 of the act of March 3, 1863, authorized the Postmaster General to establish a uniform plan for the registration of valuable letters. Under this system, envelope 28 was being carried, through the mails, when broken open.

In *United States v. Marsellis* (2 Blatch. C. C. 109), on a special verdict, judgment of conviction was given against the defendant for taking two letters containing each a twenty-five cent piece in silver. The case was argued before Justices Nelson and Betts, and no question seemed to be made that it was not a crime to steal coin from the mails, because it was not mailable matter. This judgment was given in 1849, while the Postoffice Act of 1845, which the defendant relies on, was in force. There is no statute of the United States which provides specifically that coin is mailable matter, any more than gold dust. Yet I apprehend that a packet of either of them, not weighing over four pounds and prepaid at letter postage rates, is mailable matter; and whether this be so or not, there can be no doubt but that it is a crime against the United States to take or steal either of them from the mails.

To conclude: after a long and careful examination of the case, I can find no sure ground upon which to question the legality or rightfulness of this verdict or to arrest or delay the judgment of conviction which the law declares shall be given against the defendant in consequence of it.

SENTENCE.

Thereupon the District Attorney moved for judgment, and the Court asked the defendant if he had anything to say why sentence should not be passed upon him. The defendant rose and said:

The United States v. E. G. Randall.

YOUR HONOR:—I am innocent of this crime, as sure as there is a God in Heaven, and every one connected with the prosecution knows this full as well as I do. It is the most damnable piece of persecution that was ever perpetrated against a white man. I feel certain that time will reveal my innocence and bring the guilty to justice.

The Court then pronounced sentence as follows:

You have been indicted by the grand jury of the district, for the violation of an important trust—the commission of a grave and serious crime. After a fair trial, in which you have had the aid of able, experienced and devoted counsel, and the sympathy and prayers of many warm friends, you have been found guilty as charged, by an honest and intelligent jury of your country.

By a motion for a new trial, argued ardently and at great length in your behalf, the Court has been compelled to review the testimony upon which this verdict was given. After a careful examination and consideration of the facts and circumstances proven against you, the Court is bound to approve of the verdict and pronounce upon you the sentence which the law has provided for those who violate it.

I will not harrow your feelings nor prolong this painful duty by indulging in any reflections or suggestions upon your present unfortunate condition and future prospects. The occasion will suggest to you and those present, all that I could say, and more.

The jury have recommended you to the mercy of the Court, and your former good reputation is in proof. So far as the Court knows or can see, this is your first crime. The amount stolen is comparatively small, and no one but the Omniscient can know or estimate the force of the temptation which in an evil hour for yourself and friends, caused you to stumble and fall.

The law provides that in the discretion of the Court you may be sentenced to imprisonment at hard labor for a period not less than ten nor more than twenty-one years.

In consideration of the circumstances just enumerated—particularly the recommendation of the jury and your past

In re E. G. Randall and John Sunderland.

good reputation, the Court has concluded to fix your imprisonment at the term of twelve years; and does now sentence you to be imprisoned at hard labor for the term of twelve years from this time.

And as the legislature of this State has not yet provided for the admission of United States convicts into the State penitentiary, it is ordered that this sentence be executed in the jail of Multnomah county, so far as the discipline of such prison will permit, until the further order of this Court, or it is otherwise by law provided.

David Logan, for the United States.

William Strong and Joseph N. Dolph, for defendant.

DISTRICT COURT, FEBRUARY 28, 1869.

In re E. G. RANDALL AND JOHN SUNDERLAND.

The facts concerning an alleged act of bankruptcy should be stated in the petition with such certainty and detail, as to inform the debtor of what he is required to make proof or explanation, as provided in section 41 of the act.

An allegation in a petition that the debtor being a trader, stopped payment of his commercial paper within a period of fourteen days, is too indefinite to put the burden of proof upon the debtor concerning such alleged stoppage, and may be disregarded as immaterial.

An insolvent is one who is unable to pay his debts in full at once, or as they become due.

An assignment of his property by an insolvent person for the purpose of having the same distributed among his creditors, is presumed to have been done with intent to defraud the operation of the Bankrupt Act, by preventing such property from coming to the assignee in bankruptcy, and being distributed under the act, and is therefore an act of bankruptcy.

An assignment by a solvent person of all his property to a trustee for the equal benefit of the creditors, is an act of bankruptcy, because it hinders and delays creditors in the collection of their debts, and for the same reason it is void under the statute of frauds.

DEADY, J. On January 30, 1869, a petition was filed in this Court by Einshein Brothers & Co., of San Francisco,

In re E. G. Randall and John Sunderland.

against the firm of Randall and Sunderland of this city, praying that said firm might be adjudged bankrupt, for the causes therein specified.

An order to show cause was issued and made returnable February 13; at the same time an injunction was allowed against R. and S., and their assignee, John R. Foster, restraining them from interfering with or disposing of the goods, etc., of the firm.

On the return day of the order to show cause, R. and S. appeared by counsel and filed an answer to the petition. At the same time by consent of counsel, the case was set down for hearing by the Court, at a future day. On February 20, the Court heard the testimony in the case and the argument of counsel, and took the matter under consideration.

The petition alleges the commission of three distinct acts of bankruptcy by R. and S.

I. That R. and S. within six calendar months next preceding the date of the petition—in January, 1869—did make an assignment, sale and transfer of all their stock in trade, store fixtures and accounts—the same being all the property of R. and S.—to one John Foster, with intent to delay or hinder or defraud the creditors of them, the said R. and S.

II. That R. and S. within the period aforesaid, in contemplation of insolvency, did voluntarily assign, transfer, and convey all of their property consisting as aforesaid, to one John R. Foster—the said Foster having reasonable cause then and there to believe that R. and S. were acting in contemplation of insolvency; and that said assignment, etc., was made with intent to prevent their property from coming to their assignee in bankruptcy, and to prevent the same from being distributed under the Bankrupt Act, and to defeat the object, and evade the provisions thereof.

III. That R. and S. within the period aforesaid, being merchants and traders at Portland on Wallamet, in the district aforesaid, fraudulently stopped payment of their commercial paper, *within* the period of fourteen days.

The answer of R. and S. tacitly admits the existence of

In re E. G. Randall and John Sunderland.

the debt of the petitioning creditors—\$6,183.56—and that it is provable in bankruptcy; and that they assigned all their property to Foster, but denies that such assignment was made in contemplation of insolvency, or with the fraudulent or illegal intents alleged in the petition or either of them. The answer also denies that R. and S. stopped payment of their commercial paper, or that they were insolvent or contemplated insolvency. On the trial Sunderland and Foster were examined as witnesses, but Randall not. No evidence was offered touching the third alleged act of bankruptcy.

Section 41 of the act, which provides for “a trial, to ascertain the fact of such alleged bankruptcy,” declares, that if upon such trial “the debtor proves to the satisfaction of the Court * * * that the facts set forth in the petition are not true * * * the proceedings shall be dismissed, and the respondent shall recover costs.”

The effect of this provision is to throw the burden of proof upon the respondents, and a denial of the facts in the petition by the *answer* of the respondents, does not shift this burden upon the petitioner. No other or less effect can be given to the language of section 41, requiring the debtor to prove that the facts set forth in the petition are not true. But it seems to me, on the other hand, that justice to the debtor, requires that the facts to be disproved by him, should be stated with such certainty and detail as to inform him of what he is to make an explanation or proof. A general statement in a petition that a debtor in January, 1869, stopped payment of his commercial paper for the period of fourteen days, is not, in my judgment, such an allegation of fact, as will warrant an adjudication of bankruptcy against the debtor, unless he disproves or explains it. In answer to this it may be said that the allegation concerning the commercial paper is in the language of Form 54. But it should be remembered that the various statements of acts of bankruptcy, given in Form 54, are mere outlines or skeleton statements, to be filled in with the particular cir-

In re E. G. Randall and John Sunderland.

cumstances of the case in question, and such is the direction given in the *nota bene* near the end of the Form.

This allegation should state as nearly as possible the date of the promissory note or bill of exchange, of which payment had been stopped—to whom made, and for what amount, and when payable, and whether the debtor was liable thereon as maker or indorser, and by whom the same was held when payment was neglected or refused.

Again, it may be said that if the allegation was not sufficiently distinct, the respondents should have declined to answer it on that ground, and asked that it be made more definite and certain or stricken out. This, I suppose, would be the better practice, particularly when there is an attempt to state a particular stoppage or suspension of payment, and the same is stated defectively or insufficiently. But when the allegation is a general one—that the debtor stopped payment of his commercial paper—without containing any particular fact or facts pointing to any particular paper, in my opinion, as to this, there are no “*facts* set forth in the petition,” which the debtor is required to prove not true to prevent being adjudged a bankrupt thereon.

Before proceeding to consider the second act of bankruptcy set forth in the petition it will be necessary to state the evidence or the facts established by it, which is done as follows:

I. That from August, 1868, to Jan. 9, 1869, R. and S. were engaged as partners in the retail boot and shoe business, on the corner of First and Alder streets, as the successors of Holmes and Sunderland. That on the morning of January 9, aforesaid, Randall was found guilty by a jury in the United States Court for the District, of a crime, punishable at least by ten years' imprisonment at hard labor, and that thereafter on the same day R. and S. by their writing under seal assigned, sold and transferred their entire property, consisting of stock in trade, store fixtures, and accounts, to John R. Foster, “for the benefit of all the creditors of said firm without distinction,” and after the payment of said firm creditors, to be applied to the payment

In re E. G. Randall and John Sunderland.

“of the individual debts of R. and S. according to their respective interests, that is to say, after the payment of the firm debts, the balance of the said property or the proceeds thereof, belongs to the said copartners in equal shares, and shall be so applied.” The writing then authorizes and directs the assignee “to collect the said accounts and to *manage said business*, to sell and dispose of said goods according to his best discretion and judgment for the purposes aforesaid.”

II. That the assignee executed the writing and accepted the trust, and took possession of the store and goods and carried on the business in the usual way—Sunderland remaining in the store—until the injunction was served upon him. The assignment did not state the names of any of the creditors of the firm, nor the amount separately or in the aggregate of their claims; neither did it state the names of the individual creditors of the partners nor the amount of their individual indebtedness. Sunderland testified that he owed no individual debts. Foster, when being examined by the petitioner’s counsel, testified that Randall told him that if he got what he was entitled to from the postoffice department, he thought it would pay his individual debts. An inventory of the goods, store fixtures and accounts is annexed to the assignment. The former were inventoried at their cost in San Francisco, with the freight to Portland added, and foot up \$14,213.70. The store fixtures are lumped in, without any items, at \$500. The sum of \$156.50 is charged for premiums paid for insurance upon the goods. Sum total of value of goods, fixtures and insurance, \$14,870.21. In addition to these, the inventory contains a list of accounts due the firm from about 190 different persons, the nominal value of which amounts to \$2,256.80. Of these accounts what amounts to \$104.25 are marked in the inventory as “doubtful.”

The petition charges that R. and S. are indebted to merchants in San Francisco in the sum of about \$12,000. Foster testifies that at the date of the assignment the indebtedness of the firm amounted to \$13,000. The stock of goods on hand at date of assignment was a reasonably good

In re E. G. Randall and John Sunderland.

one. There were, however, but few full packages. Most of them had been retailed from and some sizes and kind were lacking. The bulk of them was bought in August or September, 1868. Foster testifies that if the goods were put upon the market and sold at once for cash, that they would bring 30 cents on the dollar of the inventoried price, but that if he was allowed to carry on the business by keeping up the stock he could work them off so as to receive 100 cents on the dollar, and something more. Sunderland testifies, as to the cause of the assignment, that when Randall was found guilty and about to be imprisoned, that he thought he would protect his creditors by taking in a responsible party and making an assignment to him. He also testifies that on January 9 the goods were worth what they were inventoried at, and that they were sufficient to pay the debts of R. and S., but that if forced to sale for cash they would not bring 50 cents on the dollar of the inventoried price; that he did not know what the store fixtures were worth, and that as a general thing the accounts were a good lot and worth 75 cents on the dollar. Homer Sanborn, a merchant, testifies that he assisted to inventory the goods and that it is owing to circumstances whether they are worth the inventory price or not. Thought they were worth that to R. and S. Under the circumstances he would have been willing to take the goods and *business* and paid the debts of the firm. That he and John R. Foster were indorsers for R. and S. for \$1,000.

Upon this state of facts the first question that arises in the consideration of the second alleged act of bankruptcy, is the solvency of the firm of R. and S. at the time of this assignment. A solvent man is one that is able to pay all his debts in full, at once or as they become due. *Insolvency* is merely the opposite of *solvency*. A man who is unable to pay his debts out of his own means, or whose debts cannot be collected out of such means by legal process, is insolvent—and this is so, although it may be morally certain that with indulgence from his creditors, in point of time, he may be ultimately able to satisfy his engagements in full. The

In re E. G. Randall and John Sunderland.

term insolvency imports a *present* inability to pay. The probable or improbable future condition of the party in this respect does not affect the question. If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the Bankrupt Act. (*Burrill on Assign.*, 38, 41; *Herrick v. Borst*, 4 Hill, 652; *Buckingham v. McLean*, 13 How. 167; *In re The Merchants N. B.*, 1 Law Times B. R. 73; *Foster v. Hackley et al.*, 2 Id. 12.)

Tried by this rule, I have no doubt but R. and S. were insolvent at the date of this assignment. The nominal value of their assets as set forth in the inventory, including goods, fixtures, accounts and insurance, is \$17,127.01, and their debts, as testified by Mr. Foster, amount to \$13,000. It is not probable that 75 cents on the dollar could be realized from this property upon legal process, and even this result would scarcely produce enough to pay the debts, not counting the expenses of sale, etc. It is more likely it would not fetch over 50 cents on the dollar. The goods had been called over at retail. The fixtures are not itemized in the inventory, and they probably have little, if any, value out of the store-room and business in which they are used. The accounts, even if all of them were against solvent people, would scarcely pay 25 cents on the dollar after deducting the expenses of collection by legal process, and it is safe to conclude that they would not sell in open market for 50 cents on the dollar.

The parties being insolvent at the making of this assignment, did they make it with the intention to defeat or delay the operation of the Bankrupt Act? Every person is presumed to intend the natural and probable consequences of his own acts. This assignment attempts to vest the whole of the property of R. and S. in a trustee selected by them, for the purpose of equal distribution among all their creditors. If allowed to stand, one of the necessary consequences will be that the property of these insolvents will be prevented from coming to the assignee in bankruptcy and from

In re E. G. Randall and John Sunderland.

being distributed among the creditors under the Bankrupt Act, and so the operation of the act will be defeated. This natural, and not only probable, but *necessary* consequence of this assignment, the assignors must be presumed to have intended, unless they show to the contrary. As to this, the burden of proof is upon them.

The necessity of the provision in the act which makes void an assignment by an insolvent with intent to delay or defeat the act (§ 35), and also the provision which declares such an assignment an act of bankruptcy (§ 39), is apparent. Without them, the law could and would be successfully evaded to the injury of creditors. In addition, the justice and propriety of the act in this respect cannot be questioned. In good morals the property of an insolvent debtor belongs to his creditors. They being the primary and real parties in interest, are entitled to give direction in the settlement and distribution of the insolvents' estate, and to select the person to control and dispose of it for the common benefit.

To secure this result is the purpose of the Bankrupt Act. The necessary consequence of this assignment, if allowed to stand, is to defeat this purpose, in this case, and therefore the law declares the making of it, an act of bankruptcy. It would seem, that in effect the act forbids *any* assignment by an insolvent or person in contemplation of insolvency for any purpose. True, an assignment made with the consent and accepted by all the creditors of the assignor, might be upheld, not because such assignments are expressly permitted by the law, but because the creditors would be bound by their acceptance and estopped from impugning the legality of an act, which had been done with their consent and approval.

My conclusion is, then, that the facts set forth in the petition as to the second act of bankruptcy are true. That the respondents, being insolvent, made this assignment with intent to defeat the operation of the bankrupt act, by preventing their property from coming to their assignee in bankruptcy, and to prevent the same from being distributed

In re E. G. Randall and John Sunderland.

under the bankrupt act. This is a necessary consequence of the assignment, if allowed to stand, and no other purpose or object is shown or suggested for making it.

A single act of bankruptcy being proven, it is not necessary to consider the first charge in the petition that R. and S. made this assignment with intent to delay, or hinder, or defraud creditors.

If, however, the respondents were solvent at the date of this assignment, as claimed by them, then in contemplation of law the assignment would have been made to delay, hinder and defraud creditors, because, if allowed to stand, such would have been its operation and effect. An assignment by a solvent person for the benefit of creditors, with or without preferences, is void under the Statute of Frauds, because the necessary consequence of it is to delay and defraud creditors, by preventing them from subjecting their debtor's property by the ordinary legal proceedings and process to the satisfaction of their claims. (*Kellogg v. Slawson*, 15 Barb. '57; *Perry v. Langley*, 7 Am. Law Reg. 431; Burrill on Assign. 33.) Section 39 of the act makes an assignment, whether the assignor be solvent or insolvent, with intent to delay, hinder or defraud creditors, an act of bankruptcy. Upon the face of this assignment, the firm of R. and S. profess to be solvent, because they expressly provide for the disposition of the *surplus* of their property after paying their debts. Again, an assignment which authorizes the trustee or assignee to sell on credit, or in any manner to prolong his possession of the property beyond the time reasonably necessary to convert it into cash, and distribute it among the creditors, is void under the Statute of Frauds, and also an act of bankruptcy, because its necessary consequence is to delay and hinder creditors. This assignment leaves this matter to the judgment and discretion of the assignee, and even authorizes him "to manage the business" according to such judgment and discretion. The *business* of R. and S. was the retail trade in boots and shoes. If the assignee is "to manage" *this* as he thinks best, he may think best to carry it on for years, and continue to invest the

The United States v. Samuel Brown.

proceeds of sales in new stock, instead of disposing of the stock and distributing the proceeds among the creditors, at once. Indeed, I infer from the testimony of Mr. Foster, that he had some such purpose in view. From the proceeds of the sales of the property, he had already purchased some new stock. He spoke of what he expected to realize for the stock on hand by disposing of it in the course of the *business*. This process might occupy several years. In the meantime, the assignee might prosper and make money for all concerned, or he might by misconduct or misfortune lose all that had been assigned to him, and leave the creditors without anything. In the meanwhile, and however the operation might result, the creditors would be delayed and hindered in the collection of their debts.

Judgment must be given declaring the respondents bankrupts upon the ground of the assignment of their property while insolvent, with the intent to defeat the operation of the bankrupt act.

Friedenrich and Lansing Stout, for petitioners.

David Logan and Joseph N. Dolph, for respondents.

DISTRICT COURT, MARCH 18, 1869.

THE UNITED STATES v. SAMUEL BROWN.

With the policy or impolicy of an act of Congress, Courts and juries have nothing to do.

An action for a penalty for the violation of the Internal Revenue Act (14 Stat. 144), is a civil action, and the jury are to find according to the preponderance of the evidence.

In considering the evidence, a jury is bound to act deliberately and according to the dictates of reason and the teachings of experience.

The law presumes, and, until the contrary appears, juries are bound by such presumption, that a witness speaks the truth.

A box of sardines being sold unstamped, the presumption is that it never was stamped, but such presumption may be overcome by showing that the stamp had been lost or removed by accident, or the like.

A jury is not formed to reflect by its verdict the state of public opinion touching the questions involved in the case on trial.

Interest of a witness in the result of the action to be considered by the jury.

The United States v. Samuel Brown.

This was an action brought upon the information of Leander Quivey and I. G. Culpepper, against the defendant, to recover penalties to the amount of \$750, for selling nine sealed boxes of sardines and six bottles of hair oil, without the same being duly stamped.

On the trial, the witnesses for the government—Quivey and Culpepper—testified positively that they bought the above mentioned articles, at the store of the defendant, at Dayton, in Yamhill county, on July 2, 1868, of Columbus Brown, the son and clerk of the defendant, and that the same were not stamped when purchased. The sardines were produced on the trial, and the boxes bore the appearance of having once been stamped about the middle of the long edge, and that the stamps had afterwards come off.

For the defendant, Columbus Brown testified that he sold the articles in question to Quivey and Culpepper, at the time and place they stated, but that to the best of his recollection and belief they were duly stamped at the time. He also testified that all the sardines in the store at the time of the sale were purchased of Sneath, in Portland, and that they were stamped when put upon the shelves. That bottles of hair oil were purchased of Hodge & Calef, between three and four years ago. That he believed they were stamped, because never got any goods of H. & C. that needed stamping. That he was in the habit of examining goods once a month with assistant assessor Porter, to see if duly stamped. That he believed articles sold to Q. and C. duly stamped, but not positive of it.

T. J. Robertson, a saloon keeper, testified that he was an intimate friend of Culpepper's, and that about the first of February last, Culpepper came into his saloon on Morrison street, and plucked him one side and told him that he had been up the country buying sardines, and when they got any with stamps on they tore them off, and that he had the dead wood on a big thing; and that Culpepper then tapped him on the side of the nose with his finger, remarking at the time to witness: "If you reveal this, or blow on me, you know your doom."

The United States v. Samuel Brown.

Culpepper denied positively having *ever* told Robertson that they took the stamps from goods in any way, or that they ever did take the stamps off any articles purchased by them.

There were a large number of other actions brought upon the same information and tried at the same term, in all of which the following charge was substantially delivered to the jury.

DEADY, J. *Gentlemen of the Jury*:—In this case the United States complains, for that the defendant, on or about July 2, 1868, sold nine boxes of sardines and six bottles of hair oil, without the same being duly stamped, whereby the defendant became indebted to the United States in the sum of \$750, or \$50 for each of such boxes and bottles.

The defendant answering, denies that he sold the articles mentioned without having stamps affixed to them.

This action is brought upon the Internal Revenue Act as amended, July 13, 1866 (14 Stat. 144). So far as it is concerned, the act substantially provides, that if any person shall make, prepare and sell sardines in cans, or hair oil in bottles, without affixing thereto an adhesive stamp, donating the tax imposed thereon, he shall incur a penalty of fifty dollars for every omission to affix such stamp; and any person who shall offer or expose for sale any sardines in cans or hair oil in bottles, shall be deemed the manufacturer thereof, and be subject to the duties, liabilities and penalties imposed by law in regard to the sale of such article.

This law has been deliberately enacted by the representatives of the American people in Congress assembled, for the purpose of raising revenue to carry on the government and to enable it to meet its obligations. The penalties imposed by the law for its violation, are intended to secure obedience to it, and prevent the dishonest dealer from escaping his just share of taxation at the expense of the honest one.

With the question of the policy or impolicy of this law, neither the Court or jury have anything to do. While en-

The United States v. Samuel Brown.

gaged as judges and jurors we are not law makers. But you and I are called upon to administer this law fairly and fearlessly, without regard to consequences to third persons, or our personal sympathies or opinions. The law is enacted by the whole people for the whole country, and should be uniformly administered, as to all persons and in all places.

As citizens, out of Court, it is your privilege by all the means which the lawful freedom of speech and the press allows, to endeavor to procure the repeal of such laws as you think impolitic or unjust; but in the jury-box your only power and duty is to assist within your sphere in the enforcement of the law, as expounded to you by the Court.

As has been wisely said in the inaugural of the present Chief Magistrate, the most effectual way to procure the repeal of bad or obnoxious laws, *is to rigidly enforce them.*

The simple inquiry for you to make then, is this: Did the defendant by himself or his clerk sell these articles described in the complaint, without the same being stamped as provided by law?

This is the charge against the defendant, which by his answer he denies.

The burden of proof is upon the Government to establish the fact stated in the complaint. But this is a civil action. It is therefore not necessary for the Government to establish the charge beyond a reasonable doubt, as in a criminal action. You are to weigh the evidence for and against the charge and decide for or against the defendant, according to the preponderance of it. There is no presumption that the defendant violated the law, but the contrary. Therefore, if no evidence was offered in the case, one way or the other, the defendant would be entitled to a verdict. Starting with this presumption—take this evidence—weigh and consider it, and find a verdict according to what you may conclude to be the preponderance of it.

In canvassing the testimony, you are the exclusive judges of the consideration and effect to be given to it. In exercising this important power you should not act rashly or ar-

The United States v. Samuel Brown.

bitrarily, but deliberately and according to the dictates of reason and the teachings of experience.

Where there are apparent contradictions in the testimony, it is your duty to try and reconcile them. If, after reasonable effort, you cannot conscientiously do this, then you must hold fast that which you believe to be probable and true and discard the rest.

The law presumes, and you are bound to act upon that presumption, that all men, when they testify in a Court of justice under the solemnity of an oath, speak the truth. That presumption of course is not conclusive, but may be overcome in many ways. As men of ordinary experience and observation, you may be satisfied from the manner of a witness—from the intrinsic improbability of his story—from the contradictions of his testimony by other witnesses whom you have reason to believe—or from the insufficient grounds which the witness gives for his belief or statement, that he is wholly or partially unworthy of belief.

The uncontradicted testimony of one credible witness is sufficient proof of any fact in this case. The technical rule requiring two witnesses to prove a fact, as in treason or perjury, has no application in this case.

A box of sardines being unstamped when sold, the legal presumption is that it never was stamped. It is also claimed by the District Attorney, that if the stamp is not on the box when sold, the penalty is incurred by the seller, whether it was previously stamped or not. But I do not think the act ought to be so construed. If no stamp be on the box at the time of sale, I repeat, the presumption is, that the article never was stamped. But the party may, nevertheless, prove that it had been duly stamped, and that the stamp had come off or been removed by accident or other cause not involving any intention or design to remove it, by the person having the goods in his possession at the time. If the party makes satisfactory proof of this state of facts, then the *prima facie* case is overcome, and he ought not to pay the penalty imposed for selling unstamped goods. In fact the tax has been paid, but the best evidence of it, the

The United States v. Samuel Brown.

canceled stamp on the box, has been accidentally lost or destroyed.

The state of public opinion concerning this and similar cases now pending in this Court has been alluded to in your hearing. It is not necessary, I hope, for me to say, that you have not been chosen as jurors, to merely reflect by your verdict, the public opinion upon the subject of imposing penalties upon parties for selling unstamped goods. You have taken an oath to try this case—the question of fact upon which the parties are at issue—upon the law and evidence as given you in Court. With the state of public opinion you have nothing to do, nor need or should you stop to inquire upon which side is the loudest and most active clamor. Besides the so-called public opinion which sometimes seeks to intrude itself upon legal controversies, at the bidding or by the procurement of interested parties, is most oftenly ignorant or unjust and always unreliable.

As to the witnesses Quivey and Culpepper, you should consider the money interest they have in this suit. You are not to arbitrarily assume that they are unworthy of belief on this account. But it is a circumstance to be considered by you, and on account of which you are to scrutinize their testimony with care, and act upon it with caution at least. Nor are you to presume that these witnesses are unworthy of credit, because they appear before you as persons giving information to the Government against those who violate the laws, for the sake of a share of the penalty. If the defendant was openly selling sardines without being stamped, it was the legal right of any one to walk into his store and purchase them, and then inform upon him, for a share of the penalties. In all this there is no fraud or deceit except upon the part of the person selling the goods. This is what the Government claims was all that was done by these witnesses, and so far, there is nothing in their conduct to impeach their characters for truth and veracity. At the same time the position or pursuit is not free from opportunity and temptation to exaggerate and even fabricate for the sake of money or success, or to gratify a grudge. On this account

The United States v. Samuel Brown.

also, you will scan the testimony of these witnesses closely, and act upon it cautiously.

As to the contradiction between Culpepper and Robertson, you must determine which of them you will believe. If Culpepper stated to Robertson what the latter says he did, it is a very strong circumstance against the credibility of the former, for two reasons: First, because Culpepper denies it on oath; and second—because if he did tear the stamps off any boxes, it may as well have been those as any others. It may occur to you, that it is not probable that any one in the position of Culpepper, if he had torn stamps off goods for the purpose of having suits brought against parties for penalties, would voluntarily seek out a third person and disclose it to him. On the other hand Robertson testifies, that he was and still is, Culpepper's "bosom friend," and therefore, it may be said he was the latter's confidant, even to that extent.

As to the testimony of Brown—he has no actual pecuniary interest in the event of the action. But he is the son of the defendant, and attended to his business when it is claimed that this violation of the law took place. His father has twice the moneyed interest in the action that Q. and C. have together, and under the circumstances, this interest of his father, is as likely to influence him as a witness, as if it were legally his own. Besides as to the fact, whether the articles were stamped or not, at the time they were purchased by Q. and C., his testimony is only his opinion or belief based upon facts prior in date, of which he professes to have a general knowledge. You can judge for yourselves, from the premises, whether the opinion or belief is well or ill-founded, and reasonable or not, and act accordingly.

In conclusion, if you are satisfied from the testimony that the articles were sold in violation of the statute as already expounded to you, you ought to find for the plaintiff, but if you are not so satisfied, you ought to find a verdict for the defendant.—Verdict for the defendant.

John C. Cartwright, for plaintiff.

David Logan and W. W. Page, for defendant.

In re Robert A. Sutherland.

DISTRICT COURT, MARCH 29, 1869.

In re ROBERT A. SUTHERLAND.

A creditor has no standing in Court to oppose the discharge of a bankrupt, unless he enter his appearance in opposition thereto, within the day appointed for showing cause against the petition therefor.

Where there is no opposing party to the discharge, the proceeding may be continued from time to time, to suit the convenience of the bankrupt.

A creditor who has entered his appearance in opposition to a discharge, cannot maintain a motion to dismiss the petition for want of prosecution; but should move to set it down for hearing upon the objections thereto, if any, filed.

The final oath of a bankrupt is not a pleading, but is in the nature of indispensable evidence in support of the petition for discharge, and need not be made or filed until the hearing.

DEADY, J. On January 11, 1868, Robert A. Sutherland was adjudged a bankrupt in this Court upon the petition of certain of his creditors. On December 19, 1868, said bankrupt filed his petition for discharge. Upon the filing of the petition, an order was made that the creditors show cause against the same, on January 23, 1869. On that day, no one appearing for or against the petition, it was continued under the rule of the Court until the following Saturday, and so on until March 13, when the attorneys for the petitioning creditors filed a motion, that the bankrupt's application for a final discharge, "be denied upon the ground that the day fixed for the hearing of such application has elapsed, and that the oath required by law thereon, has not been filed."

By consent of counsel for the bankrupt and the aforesaid creditors, the motion was set for hearing on March 20, at which time it was argued by counsel.

This subject is regulated by sections 29 and 31 of the Act and General Order XXIV. Upon the day appointed to show cause, a creditor intending to oppose the application for discharge, must enter his appearance in opposition thereto. His appearance is entered with the clerk as provided in General Order III. Until such appearance is entered, the creditor has no standing in Court as to the peti-

tion for discharge, and therefore cannot be heard in opposition thereto. Where there is no opposing party, the petition of the bankrupt for final discharge, may be continued from time to time, to suit the convenience of the bankrupt. When an appearance has been entered by any creditor against the discharge, the proceedings upon the petition are no longer under the exclusive control of the bankrupt; but the opposing creditor cannot then move to dismiss the petition, or that its prayer be denied, because the bankrupt is, or supposed to be, dilatory in bringing the matter on for hearing. The remedy of the creditor is to move the Court to set down the matter for hearing upon the petition, and his objections thereto, if any, be filed.

This motion, therefore, must be denied. The parties making it have no standing in Court, as to the petition, although they were the petitioners in the proceeding on which Sutherland was adjudged a bankrupt. Nor is it correct to say, as in this motion, that *the day fixed for hearing* the bankrupt petition has elapsed. In fact no day has yet been fixed or appointed for the hearing of the application for discharge. True a day has been appointed for the creditors to "show cause why a discharge should not be granted to the bankrupt." (§ 29). This day the creditors have allowed to pass by without entering their appearance or filing grounds of opposition to the application for discharge. Under General Order XXIV, the application could not be set down for hearing, except by consent of the creditors, until the day appointed for showing cause had elapsed, because the creditor has the whole of that day to enter his appearance in opposition thereto. If an appearance is entered then the party entering it has ten days thereafter to file his objections to the granting of the discharge. After this time has elapsed, the Court may make an order upon the application of either party, setting the petition down for hearing or trial as the case may be.

The second ground of the motion seems to assume that the bankrupt must make and file his final oath as required by section 19, before the day appointed for the hearing of

In re J. M. George Kallish.

the petition, or even showing cause against it. Indeed, upon the argument, counsel for the motion treated this oath as a quasi pleading, or a part of the allegations against which the creditors are cited to show cause. But this oath is merely an item of indispensable evidence, without which the bankrupt is not entitled to his discharge; and it is sufficient if it be produced and filed on the hearing. This is apparent from the language of the act:—"and *before any discharge is granted*, the bankrupt shall take and subscribe an oath to the effect that he has not done, etc., anything specified in this act as ground for withholding such discharge, or as invalidating such discharge if granted." (§ 29.) The motion is denied.

W. W. Fechheimer, for motion.

David Logan, contra.

DISTRICT COURT, APRIL 3, 1869.

In re J. M. GEORGE KALLISH.

A willful omission to state a debt due by the bankrupt to another in his schedule is good ground for refusing a discharge.

Quere, that persons not prejudiced by such omission, should not be heard to object thereto.

Discharge refused, the opposing creditor's right to be heard in opposition thereto not being questioned.

DEADY, J. On June 13, 1868, Kallish was adjudged a bankrupt upon his own petition. On December 17, 1868, the bankrupt filed his petition for final discharge from his debts provable under the act. At the date of filing the petition for discharge, no debts had been proved against the estate, but on January 22, 1869, four of the bankrupt's creditors proved their debts before the register, amounting in the aggregate to \$2,363.98.

On February 20, 1869, the creditors proving debts, filed

their objections to the discharge, with five specifications, the first of which is as follows:

1. "That said bankrupt did willfully swear falsely in his affidavit annexed to his schedule, in that the said bankrupt fraudulently omitted to mention the existence of an unliquidated account, between himself and his brother-in-law, P. Horning."

The remainder of the specifications are substantially as follows:

2. The fraudulent omission from the schedule of a debt due the bankrupt from the said Horning of about \$2,000.

3. That the bankrupt on or about January 1, 1865, gave a fraudulent preference to said Horning by conveying to him a saloon in the city of Portland for the purpose of delaying and defrauding his then existing creditors.

4. That the bankrupt is a trader in ice, and has failed since the passage of the Bankrupt Act to keep proper books of account.

5. That the bankrupt has concealed part of his effects from his assignee, in that he failed to disclose to the assignee the existence of the debt aforesaid, alleged to be due him from said Horning.

The case was set for trial on March 22, and was heard by the Court. Kallish and Horning were examined as witnesses on behalf of the opposing creditors. No other testimony was introduced.

On the argument, counsel for the creditors abandoned the specifications except the first. Kallish and Horning are brother-in-laws—the former having married the sister of the latter. Kallish has one child living and buried one last summer. Horning is a bachelor and lives in the same house with Kallish. In fact they appear to constitute but one family.

They both testify that in the latter part of 1864, or the early part of 1865, Kallish sold and conveyed to Horning a saloon and small ice-house in Portland, and a salt-works near Portland. The saloon was valued at \$600 and the salt-works at \$2,500, but the sales were not made at once, nor do they state which was made first.

In re J. M. George Kallish.

At the time of these purchases they state, that Kallish owed Horning for money borrowed in 1863, about \$1,000, for fifteen months labor in 1863-4, at \$75 per month, \$1,125—in all—\$2,125. At the time of the purchase of the salt-works Horning professed to pay for them by his two promissory notes of \$1,250 each, payable in one and two years. Since then, Kallish (according to this testimony) has worked for Horning in the saloon and ice business without other wages than his support, and a promise of a part of the profits, if any should be made. Horning's notes have been long since delivered up and canceled—one of them within a month of the sale, and the other within a year.

Shortly after the sales aforesaid, these witnesses testify that Horning paid for Kallish, money as follows: to laborers at salt-works about \$250; to one Phillippi, for beer furnished saloon prior to Horning's purchase thereof, \$600; to discharge mortgage on salt-works, \$660—in the aggregate \$1,510.

This statement of their affairs makes the account between K. and H. stand thus: Horning owed K. for saloon and salt-works, \$2,125. Kallish owed H. for borrowed money, labor and debts paid for him, as above stated, \$3,625, leaving a balance due Horning from K. of \$525.

Whether these transactions actually occurred between these parties, or were merely simulated by them, to protect Kallish's property from the demands of his creditors, may be a question. The fact that K. was then largely in debt is a circumstance calculated to cast suspicion upon their integrity. His indebtedness, all or principally contracted before that time, is \$5,021.46, while his assets are nothing. Besides, there is the fact that Kallish has since carried on the saloon and ice business, as Horning's agent, without salary or wages. Horning paying the expenses of the family, of which he is practically a member.

However, counsel for the creditors does not press the consideration of this question, but insists that the proof supports the first specification, and for that reason, the discharge ought not to be granted. There can be no doubt from this state-

In re J. M. George Kallish.

ment of the accounts, but that there was a balance due from H. from K. The schedules of the bankrupt are silent on this point. Besides, both Kallish and Horning swear positively that now and on May 30, 1868, the date of the affidavit to the schedule and petition, the former is and was indebted to the latter. Horning testifies that this indebtedness of May 30, 1868, was between \$600 and \$800. Kallish testifies that on said date he owed H. about \$500 or \$600, more or less, but more than \$300, and that he knew it when he made his oath to his schedule, but that he had no account of it.

Assuming that this testimony is credible, the first specification is proved. The affidavit to schedule A declares, that the same "to be a statement of *all* his debts," while this indebtedness to Horning is not mentioned therein. The act (§ 29) provides that:

"No discharge shall be granted, or, if granted, be valid if the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule or inventory."

No explanation is offered by the bankrupt, of this discrepancy between the proof and his affidavit to the schedule. The bankrupt now testifies that on May 30, 1868, he was indebted to Horning and that he knew it, while his sworn schedule of same date is silent as to the matter.

Upon this state of facts, the conclusion is natural and reasonable, that the omission to place this debt in the schedule was intentional, and that the affidavit annexed thereto was willfully false.

But I am not prepared to determine, beyond further consideration, that under these circumstances the opposing creditors are injured by this omission or falsehood, or that any one ought to be allowed to object to the discharge on this account, unless it be Horning, to whom the omitted debt appears to be due. I am not altogether satisfied in my own mind, but that the act ought to be so construed that this objection could only be made by a creditor who is interested in the debt which is the subject of the misconduct of the bankrupt, or who is or may be injured by the omission or falsehood concerning it.

The United States v. E. Fox.

But this question has not been made by counsel on the argument, and the case is within the letter of the provision of the act prohibiting a discharge, and an order will be made dismissing the petition for discharge.

Joseph N. Dolph, for petitioner.

M. W. Fehheimer, contra.

DISTRICT COURT, MAY 15, 1869.

THE UNITED STATES v. E. FOX.

The verdict of a jury is presumed to be correct and should be sustained, if the evidence by any fair construction will warrant such finding.

Goods are sold "in the original and unbroken package" within the meaning of the act of July 13, 1866 (14 Stat. 144), although the package is opened for inspection, if closed again before delivery without the contents being changed.

When the verdict of a jury is directly contrary to the evidence and the law applicable thereto, it is the imperative duty of the Court to set it aside; and it makes no difference in this respect that the action is brought to recover a penalty given by statute.

What is called "the justice of the case" on a motion for a new trial is not affected by the fact that a moiety of the penalty recovered will go to the person who gave information of the violation of the law, whereby such penalty was incurred.

DEADY, J. On February 11, 1869, the plaintiff commenced this action to recover from the defendants the sum of \$1,300 penalties. The complaint contains three counts. The first charges that the defendants at Corvallis on July 8, 1868, sold twelve bottles of pomade, without the same being duly stamped. The second charges at the place and date aforesaid the sale of twelve bottles of hair oil, without the same being duly stamped; and the third count is upon the sale of two bottles of Lubin's Extract without being stamped.

On March 10, 1869, the defendants answered the complaint, and thereby denied that they sold the several articles mentioned in the complaint without the same being duly

stamped. On May 4, 1869, the case was tried before a jury, which resulted in a general verdict for the defendants.

On May 5, the District Attorney filed a motion for a new trial, which motion on the following day was argued by counsel and taken under consideration by the Court.

On the trial the Government witness—Leander Quivey—testified that at the time and place mentioned in the complaint, he purchased the articles therein specified of the defendant E. Fox, in the store of E. Fox & Bros., and that the same or any of them were not stamped. That at the time the witness, in company with one Culpepper, was traveling through the Wallamet and Umpqua valleys, purchasing these and similar articles at the various stores along the route, for the purpose of causing actions to be brought against the sellers, to recover the penalties given by law against the persons who sold perfumery, sardines, etc., without the same being duly stamped. That the witness was induced to this, in the expectation of obtaining a moiety of the penalties that might be recovered and for the purpose of compelling the defendants and others engaged in selling unstamped goods, to obey the law.

The articles said to have been purchased by the witness, were produced by him before the Court. These were a small wooden box containing 12 one ounce and a half bottles of hair oil, and a similar box, somewhat larger, containing 12 bottles of pomade, and 2 bottles of Lubin's Extract. None of the bottles produced were stamped or appeared ever to have been stamped. The boxes were evidently the original packages in which the goods were packed by the manufacturer. In the inscription upon the bottles and the brand upon the boxes there was evidence tending to show that the goods were of French manufacture, and therefore "imported articles."

In relation to the circumstances of the purchase, the witness, Quivey, testified that he purchased these articles of the defendant E. Fox. That before the purchase was made, and while the witness was bargaining for the goods, E. Fox opened both the boxes, so as to enable the witness to ex-

The United States v. E. Fox.

amine one or two bottles in the small box and five bottles in the larger box. That at the suggestion of Culpepper, who was near by, witness asked Fox to take out three bottles from the larger box and replace them with three smaller bottles of pomade from an unpacked lot of perfumery in bottles, then on the store shelf. That Fox made the exchange as required, when the purchase was completed and Fox nailed up the boxes and delivered them to the witness, who paid him for them. At the same time the witness purchased the two bottles of Lubin's Extract, which Fox took from the shelf. The witness also produced a bill of these articles, made out to himself, dated "Corvallis, July 8, 1869," and receipted in the name of "E. Fox & Bros.," which he testified was written and delivered to him by Fox at the time of the purchase. In this bill, the pomade is charged in two lots—three quarters of a dozen at \$3.50 per dozen, and one quarter of a dozen at \$2.50 per dozen, thus corresponding to the statement of the witness, that there were nine large and three small bottles of that article.

E. Fox, one of the defendants, testified that about July, 1868, at Corvallis, he sold Quivey two boxes of perfumery and two bottles of Lubin's Extract. That the boxes were similar to those produced in Court, but could not say positively that they were the same ones. That he opened both the boxes that he sold to Quivey and showed him the contents and then nailed them up again. That before closing one of the boxes he took out three of the bottles and took three bottles off the shelf and put them in the box in place of those taken out. That the two bottles of Lubin's Extract and three bottles of pomade taken off the shelves were stamped, but that the oil and pomade originally in the boxes were not stamped.

O. Fox, the brother of E. Fox, testified that he was employed in defendant's store at the time of purchase, and had been for three years previous. That he was not very near to his brother when the sale was made, but that he was in the store and saw that his brother was selling perfumery, some in boxes and some by the bottle. That he did not ob-

serve whether the bottles were stamped or not, but he was certain that they were, because he knew that all the bottles on the shelves were stamped.

This action is brought upon the Internal Revenue Act of July 13, 1866 (14 Stat. 144).

It substantially provides that any person who shall make, prepare and sell, or remove for consumption or sale, among other things, any *perfumery*, whether of foreign or domestic manufacture, without affixing a proper stamp thereon, shall incur a penalty of fifty dollars for every such omission; and that any person who shall offer or expose for sale any such perfumery shall be deemed the manufacturer thereof. *Provided*, that when imported perfumery shall be sold in the *original and unbroken* packages in which the bottle or other enclosure was packed by the manufacturer, the person so selling such article shall not be subject to any penalty on account of the want of the proper stamp.

The grounds of the motion for a new trial as stated therein, are:

1. That the evidence is insufficient to justify the verdict; and,
2. That it is against law, and contrary to the instructions of the Court.

For either of those causes, when the material rights of a party are substantially affected thereby, the Court may and should, upon the motion of the party aggrieved, set aside the verdict. (Or. Code, 197.)

- As to the second and third counts of the complaint, this motion must be denied. Upon the question of whether the two bottles of Lubin's extract were stamped or not, there was conflicting evidence nearly balanced. The verdict of a jury is presumed to be correct, and should be sustained by the Court, if the evidence by any fair construction will warrant such a finding. (3 G. & W. on New Trials, 1239-40.) Upon this conflict of testimony, the jury were entitled to decide this question of fact, and the Court ought not to disturb their verdict, although it might have come to different conclusions from the same premises.

The United States v. E. Fox.

As to the twelve bottles of oil contained in the smaller box, there was no conflict in the testimony, and the verdict in this respect corresponds with the evidence and the instructions of the Court.

It was manifest that this box was an original package, within the purview and reason of the proviso to section 169. What constitutes such an original package, must depend in a great measure upon the circumstances of the particular case. It is apparent that the object of the proviso was to relieve the importer and jobber from the trouble and expense of opening the package immediately enclosing the bottle or other article, and stamping it, and then repacking it. But whoever sells these goods in broken packages, is not within the reason of the proviso. He can stamp them without any unnecessary inconvenience or expense, and he must do it or incur the penalty for the omission.

Although the top of this box was taken off by the defendant Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again, with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not *then* required to be stamped; and to this effect the Court instructed the jury on the trial. Then the only remaining inquiry is, was the package imported? Upon this point the evidence was weak; but from the label on the bottles and the brand on the box, in the absence of anything to the contrary, the jury were warranted in finding in the affirmative of this question.

But as to the count upon the 12 bottles of pomade, this verdict must be set aside. True, as to the three bottles which were taken from the shelf and placed in the box, there was a conflict of testimony, as to whether they were stamped or not. But as to the nine bottles, which were a part of the original contents of the package, there is no conflict of testimony.

The evidence of the government witness and the defend-

ant agree in every particular. The package was opened, and three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the Court instructed the jury. In this respect, this verdict is directly contrary to the evidence and the law. It is therefore the imperative duty of the Court to set it aside. But it is said that this is a penal action—for a penalty—and therefore the Court should not disturb the verdict, however plainly against the evidence and law. The provisions of the Code, however relating to new trials, make no such distinction, nor is there any good reason why they should. The rule prescribed is uniform, whether the action be for a penalty or upon a contract. If the evidence be insufficient to justify the verdict, or the same be against law, it should be set aside.

It may here be admitted, that what is sometimes called “the justice of the case,” is also to be considered by the Court upon an application for a new trial. But what is this “justice of the case,” unless it be the rights which the law would give or withhold from the parties, regardless of any technical advantage which one may chance to obtain over the other. Considered in this light, “the justice” of this case is with the plaintiff, so far as the penalties arising from the sale of the nine unstamped bottles of pomade is concerned. The defendant, upon his own testimony, sold them in a broken package without stamps, and thereby incurred these penalties, which the United States has a good right to recover from him as he has to the profits of the sales of his goods. Nor is the “justice of the case” in any manner affected by the fact, that the United States has seen proper to provide, that a moiety of these penalties, when recovered, shall be given to the person who gave information of the violation of the law, by which they were incurred. With the policy or impolicy of imposing these penalties the Court has nothing to do. Whoever has incurred them without fraudulent intent or gross negligence may have them remitted by applying to the secretary of the treasury. But, when in a Court of law, the illegal sale of unstamped goods is

In re W. C. Whetmore.

shown, as in this case, by clear and unquestioned evidence, the verdict should be given accordingly, and if for any reason it is not, the Court will not hesitate to set it aside as erroneous. Upon the power of the Court to set aside a verdict in an action for a penalty, independent of the Code. (See *United States v. Halberstadt*, Gilp. 262.)

An order will be made refusing the motion for new trial as to the second and third counts, and setting aside the verdict as to the first count, provided that the plaintiff will file a written admission for the purpose of a new trial, that three of the bottles described in said count were duly stamped.

John C. Cartwright, for motion.

David Logan, contra.

DISTRICT COURT, JUNE 18, 1869.

In re W. C. WHETMORE.

The "business of a contractor" is not a "trade, occupation or profession" within the meaning of the act (Or. Code, 211), exempting certain tools and implements from execution.

Where the affidavit to a schedule states in the prescribed form, that it contains a statement of all the bankrupt's estate, its truth is not affected by an erroneous claim in such schedule that a certain article therein mentioned is exempt from execution.

If the bankrupt makes an erroneous claim to property mentioned in the schedule, as being exempt from the operation of the Bankrupt Act, it is the duty of the assignee to correct or disregard it.

Where a bankrupt, in pursuance of an arrangement with a certain creditor, omits his debt from his schedule, such creditor will not be permitted to object to the bankrupt's discharge on that ground.

DEADY, J. On October 27, 1868, the petitioner was adjudged a bankrupt on his own petition. No debts having been proved against his estate, on March 26, 1869, the petitioner filed his petition for final discharge from his debts. To this petition John A. Blanchard, a creditor, appeared

In re W. C. Whetmore.

and filed specification of grounds of opposition to the discharge.

On May 22, 1869, the matter was tried by the Court, without the intervention of a jury.

The grounds of opposition to the discharge, are:

1. That the bankrupt swore falsely in his affidavit annexed to his schedule, in this, that he willfully failed to insert therein a certain judgment debt due said Blanchard.

2. That said bankrupt swore falsely in the affidavit aforesaid, in this, that he claimed a horse and spring-wagon, as exempt, on account of being necessary to carry on his business.

3. That said bankrupt swore falsely in the affidavit aforesaid, in this, that he willfully failed to insert in his schedule a debt due to S. F. Shattuck.

The latter ground of opposition seems to have been made under a misapprehension of the facts, and was abandoned on the argument.

The second ground of opposition is insufficient. The bankrupt is a house carpenter, and it may be admitted that a horse and wagon are no part of the tools or implements necessary to enable a carpenter to carry on his trade. If he is also engaged in the *business* of a contractor, he may find it necessary to own or employ a team or teams. But the *business* of a contractor is not a "trade, occupation or profession" within the meaning of the local law of this district, which exempts certain tools, implements, etc., from execution. (Or. Code, 211.) If the law were construed otherwise, a merchant or shopkeeper might successfully claim his stock-in-trade, of whatever value, to be exempt from the operations of the act, because the same would be necessary to enable him to carry on his business.

But the affidavit to schedule B does not state that this property was exempt from the operation of the act because necessary to carry on his business. It is in the prescribed form and merely declares "the said schedule to be a statement of all his estate, both real and personal," etc. In this

In re W. C. Whetmore.

respect the truth of the affidavit is not questioned. True, the schedule itself contains a statement that this horse and wagon is exempt, but it seems to me that this is no part of the affidavit. And if it were, I do not think it would be sufficient to prevent the petitioner's discharge. If the schedule contains "an accurate inventory" of the bankrupt's property, that is sufficient. Whether a particular article should be stated in the schedule as exempt from the operation of the act or not, must often be a mere matter of opinion. An error in this respect, however gross, if the *facts* are truly stated, it seems to me is not a bar to a discharge. If the bankrupt makes an erroneous or unfounded claim in this respect, it is the duty of the assignee to correct it, and if he fails to do his duty in the premises, the creditors may appeal to the Court for relief.

As to the first ground of opposition, the testimony establishes the following facts:

Before the commencement of the proceedings in bankruptcy, the opposing creditor, Blanchard, had a judgment against the bankrupt for \$16.50. Whetmore, being desirous of going through bankruptcy, consulted an attorney, who advised him to settle or arrange Blanchard's claim, and go through for the rest of his liabilities, which he called "Cariboo debts." The result was that the attorney for the bankrupt and Blanchard, with the bankrupt's assent, agreed that the attorney would pay the debt of \$16.50, and that the same might be omitted from the schedules in the contemplated proceedings in bankruptcy.

Whether this transaction amounted to a novation by which the debt due from the bankrupt was extinguished, or is a mere promise by the attorney to pay the debt of another, may be a question.

But in any view of the matter, the circumstances are sufficient to preclude *this* creditor from opposing the discharge upon this ground. He agreed and consented to the omission of the debt from the schedule. Upon this understanding the bankrupt filed his petition in bankruptcy, omitting this debt from his schedule. The creditor having induced

John Briscoe v. Alanson Hinman.

the bankrupt to make this omission ought not now to be heard to object to his discharge, on account of it.

Of course, I do not intend to be understood as endorsing the morality or propriety of this transaction. On the contrary, it is quite evident that there was an intention to prefer Blanchard contrary to law and by the suppression of fact. But as to this, the parties are equally in the wrong, and the law leaves them as it finds them. The discharge is granted.

Robert Bybee, for petitioner.

M. W. Fechheimer, for creditor.

DISTRICT COURT, JUNE 25, 1869.

JOHN BRISCOE v. ALANSON HINMAN.

In an action for a penalty given by statute the complaint must state that the act or omission by which it was incurred was done or omitted contrary to the statute.

In an action for a penalty by a private person the complaint must allege the right of the plaintiff to sue therefor.

In an action against a collector of customs for the penalty given by section 24 of the Steamboat Act of 1852 (10 Stat. 71), it must appear from the complaint, with reasonable certainty as to time and place, that the vessel was engaged in carrying passengers while navigating the waters of the United States.

The allegations that a vessel was engaged in carrying passengers between January 1 and May 1, 1868, and that on certain trips such vessel carried goods or passengers, are bad for uncertainty.

DEADY, J. This action is brought to recover of the defendant, as collector of customs for the district of Oregon, fifteen penalties of \$100 each.

The complaint alleges, that between January 1 and May 1, 1868, a steamboat "called the *Ranier*," of about — tons burden, was engaged in navigating the waters of the Columbia river, within said district, and in carrying passengers and freight therein.

John Briscoe v. Alanson Hinman.

That between the dates aforesaid and on certain dates named therein, said steamboat arrived and departed from and made trips upon said Columbia river, within said district, from and to certain places named therein—in all fifteen in number.

That at the several times above mentioned, the *Ranier* transported goods, wares and merchandise, *or* passengers, on said Columbia river, and that on neither of said days, nor at any time between the dates aforesaid, had the *Ranier* any certificate or license as by law required; “and that the defendant, collector of customs as aforesaid, has negligently *or* intentionally omitted to enforce the provisions of law against said steamboat for each and every violation thereof as aforesaid; wherefore the plaintiff demands judgment against defendant for the sum of \$100 for each omission of the duty of said defendant as above mentioned,” etc.

The defendant demurs to the complaint, because it does not state facts sufficient to constitute a cause of action, for that:

1. It does not appear therefrom, what, if any, statute of the United States was violated by the *Ranier*.

2. It does not appear therefrom that the defendant did or omitted any act contrary to any statute of the United States, whereby any penalty was incurred.

3. It does not appear therefrom that the plaintiff has any right or capacity to sue the defendant.

4. Said complaint misjoins acts of said steamboat, some in carrying passengers and some in carrying freight.

5. The allegations therein are in the alternative and do not show precisely what charge is intended to be made.

On June 18, the demurrer was argued by counsel and the cause continued for consideration until to-day.

The first and second causes of demurrer raise similar questions. In these respects the demurrer is well taken. This is an action for penalties given by statute and the complaint must not only state the acts of omission or commission by which they are claimed to have been incurred, but also that they were omitted or done contrary to the form of

John Briscoe v. Alanson Hinman.

the statute in such cases made and provided. (*Peabody v. Hayt*, 10 Mass. 39; Bright. Fed. Dig. 638.)

The third cause of demurrer is also well taken. Upon this point the complaint is insufficient. It should allege not only the forfeiture, but that by force of the statute, etc., an action hath accrued to the plaintiff to have and demand of the defendant the penalty forfeited.

A penalty incurred under section 2 of the Steamboat Act of July 7, 1838, is forfeited to the United States, with the qualification* that one half of it shall be recovered for the use of the informer. For this penalty only the United States can sue. (*Matthews v. Offley*, 3 Sum. 115.) But a penalty incurred under the act of August 30, 1852, by virtue of section 66 thereof, may be recovered by any person who will sue for it.

Before considering the fourth and fifth causes of demurrer, it will be necessary to state substantially the provisions of the act of 1838 and 1852, relating to the forfeiture and recovery of these penalties.

Section 2 of the former act prohibits the transportation of *goods or passengers* upon navigable waters of the United States in steamboats, without first obtaining a license from the collector and complying with the conditions of that act; and imposes a penalty of \$500 upon the owner for each violation of this provision, which penalty may also be enforced against the vessel.

By section 1, of the latter act, it is provided that no license or other paper shall be granted to any steamboat *carrying passengers*, until the provisions of that act are fully complied with; and if any such vessel shall be *navigated with passengers on board* without such compliance, the owners and vessel itself shall be subject to the penalties provided in section 2 of the act of 1838, to wit: \$500 for each time she is so navigated with passengers on board.

Section 24 of same act, declares it to be the duty of collectors of customs "to enforce the provisions of law" against all such steamers arriving and departing; and provides that if such collector negligently or intentionally omit his duty in

The George S. Wright.

this particular, he shall be removed from office and be subject to a penalty of \$100 for each offence, to be sued for in an action of debt.

Navigating the waters of the Columbia without a license, was not a violation of either act, unless passengers or freight were actually carried or transported on the boat. The allegation of the complaint as to the Ranier's being "engaged in navigating the waters of the Columbia river" between January 1 and May 1, 1868, may be laid out of view; while the allegation that she was engaged in "carrying passengers and freight" between the same dates, is not sufficiently certain and specific as to time and place.

The allegation that the Ranier, on the fifteen trips above mentioned, transported goods, wares and merchandise, or passengers, is also insufficient for uncertainty. The statement being in the alternative is not an absolute averment that she carried either. So also, the allegation that the collector negligently or intentionally omitted to enforce the provisions of law against the Ranier.

The demurrer is allowed.

The plaintiff on application had leave to file an amended complaint within twenty days, upon the payment of \$10 costs to the adverse party or his attorney.

John H. Reed, for plaintiff.

Erasmus D. Shattuck, for defendant.

DISTRICT COURT, JULY 2, 1869.

THE GEORGE S. WRIGHT.

By the act of February 25, 1867 (14 Stat. 411), a sea-going steam vessel, subject to the navigation laws of the United States, when navigating any of the waters thereof, is required to be in charge of a pilot licensed by the inspectors of steam vessels, but such act is cumulative, and does not annul or supersede a State law requiring that such pilot when piloting such vessel within the limits of the State, should also be licensed by the Pilot Commissioners of the State.

The George S. Wright.

Claims for half pilotage for offer and refusal of services, are cases of admiralty jurisdiction, and a suit therefore may be maintained against the vessel or master; and a State Statute which provides that in a certain contingency the consignee shall also be liable therefor, does not affect the jurisdiction in admiralty, but only gives an additional remedy against a third person.

Suggestions as to the regulations of pilot fees by Congress rather than the State.

DEADY, J. This suit is brought to recover \$95 for half pilotage, claimed to be due the libellant on account of the offer of his services to pilot the Wright from the port of Astoria, over the bar of the Columbia river to the open sea, and the refusal of the same by the master, on January 14 and April 8, 1869.

From the pleadings and stipulation of the parties, the material facts appear to be as follows:

I. That on the dates aforesaid, and each of them, the libellant was duly qualified and authorized by the laws of the United States, and of the State of Oregon, to pilot the George S. Wright from the port of Astoria over the bar of the Columbia river to the open sea, and that on said dates respectively said libellant hailed said Wright at the port of Astoria, and offered to pilot her from said port across said bar to the open sea, but that the master of said vessel then and there refused to accept said offer or permit libellant to come on board or pilot said vessel.

II. That on the dates aforesaid, and each of them, the George S. Wright was a sea-going vessel, propelled by steam, engaged in carrying passengers, and bound on a voyage from Portland on Wallamet, to the foreign port of Victoria; and that Henry Langdon was then and there the master of said vessel, and duly qualified, licensed and authorized under the statutes of the United States in such cases made and provided, to pilot said vessel from the port of Astoria over said bar to the open sea, but was not so qualified or authorized under the statutes of Oregon, relating to pilots and pilotage on said river and bar or either of them.

III. That at the dates aforesaid, and each of them, said vessel proceeded on her voyage from the port of Astoria to

the port of Victoria aforesaid, and was then and there piloted from Astoria aforesaid to the open sea by the master thereof; but that the libellant was the first pilot that then and there offered to pilot said vessel from Astoria to the open sea who was duly authorized and qualified therefor, under the laws of the State of Oregon, relating to pilots and pilotage upon said river and bar.

Upon this state of facts, is the libellant entitled to recover half pilotage for the offer and refusal of his services as aforesaid? As the law then stood and still remains, this question must be answered in the affirmative. A brief statement of the legislation and judicial decisions upon the subject will make this apparent.

On August 17, 1789 (1 Stat. 54), Congress passed an act adopting the existing laws of the States regulating "pilots in the bays, inlets, rivers, harbors and ports of the United States," together with such laws as they might hereafter enact for that purpose, "until further legislative provision should be made by Congress."

On August 30, 1852, Congress passed an act relating to vessels propelled by steam, and carrying passengers on any of the navigable waters of the United States. Section 9 of of this act (10 Stat. 63), declares:

"That instead of the existing provisions of law for the inspection of steamers and their equipments, and instead of *the present system of pilotage of such vessels*, and the present mode of employing engineers on board the same," certain regulations prescribed by that act shall be observed. One of these regulations is to the effect that pilots for such vessels must be licensed and classified by United States inspectors; and another prohibits, under a penalty of \$100, any person from employing, or any person from serving as pilot on such vessel without such license.

In *The Panama* (ante, 34), this Court decided, that under the act of 1852, a steam vessel carrying passengers *anywhere* upon the waters of the United States, must be under the charge of a pilot licensed under that act; and that the master of such vessel was prohibited from taking on a pilot *anywhere*, unless so licensed.

The George S. Wright.

Three years afterwards, the Supreme Court of the United States, in *Steamship Company v. Joliffe* (2 Wall. 450), decided that the act of 1852 did not apply to port or bar pilots, and that, therefore, the State law regulating pilots in the bay of San Francisco was in nowise modified or affected by the act of 1852. As a matter of *opinion* simply, I have yet seen no reason to question the soundness of the conclusion arrived at in *The Panama*, but, of course this Court is bound by the authority of *Steamship Co. v. Joliffe* (*supra*).

This was the state of the law upon the subject until July 25, 1866, when Congress passed an act to provide for the safety of the lives of passengers on steam vessels. Section 9 of this act (14 Stat. 228), provides:

“That all vessels navigating the bays, inlets, rivers, harbors and other waters of the United States, except vessels subject to the jurisdiction of a foreign power and engaged in foreign trade, and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the United States. * * * *

“And every sea-going steam vessel now subject to the navigation laws of the United States, * * * shall, when under way, *except upon the high seas*, be under the control and direction of pilots licensed by the inspectors of steam vessels; * * * .”

By the enactment of this provision Congress has declared that the construction given to the act of 1852, by this court in *The Panama* shall prevail, so that, “except upon the high seas,” or stated conversely, upon the navigable waters of the United States, including ports and harbors, a sea-going steam vessel must be under the direction of a pilot licensed under the act of 1852, and not otherwise.

On February 25, 1867, the act of July 25, 1866, was amended by re-enacting section 9 thereof (14 Stat. 411), with the following proviso:

“That nothing in this act, or in the act of which it is amendatory, shall be construed to annul or affect any regulation established by the existing law of any State requiring vessels entering or leaving a port in such State to take a

The George S. Wright.

pilot duly authorized by the laws of such State, or of a State situate upon the waters of the same port."

This is the latest Congressional enactment upon the subject. In my judgment this proviso does not change the legal effect of section 9 of the act of 1866. A sea-going steam vessel *anywhere* upon the navigable waters of the United States, whether "entering or leaving a port," must still be under the direction and control of a pilot licensed by the inspectors of steam vessels.

But on the other hand, the act of Congress, with or without the proviso, does not annul or abrogate the State laws concerning pilots and pilotage in the ports and harbors, except so far as the latter may conflict or be inconsistent with the former. The former in effect prohibits a mere State pilot from piloting a sea-going steamer in the port or elsewhere upon the navigable waters of the United States. But if the pilot be licensed by the United States inspectors, then the act of Congress is satisfied and does not exclude the operation of State laws providing additional regulations upon the subject of pilots and pilotage. In short, the act of Congress is merely a cumulative provision. It annuls nothing, but adds an additional qualification, in the case of pilots, piloting sea-going steamers.

The State regulations upon the subject of pilots and pilotage between Astoria and the open sea are contained in an act for the establishment of a pilotage upon the Columbia and Wallamet rivers, passed October 17, 1860 (Or. Code, 839), with the amendments thereto.

It provides for the creation of a board of pilot commissioners, who are authorized to examine and license pilots on the Columbia river and bar below Astoria, and prescribes their qualifications, duties and compensation. Any such pilot is authorized to take charge of any vessel, not less than twenty-five tons burden, bound in or out of the Columbia river. The master of such vessel may, if he choose, pilot her in or out of the river, "but he shall, notwithstanding, when bound into the river, *pay to such pilot, as shall first offer his services outside of the bar, full pilotage.* * * * and if

The George S. Wright.

bound out, one half pilotage." If the "master omit or refuse to pay the pilotage fees in any instance, * * * then his consignee shall become liable for the same."

These regulations are not inconsistent with the acts of Congress upon the same subject. They can stand together and be obeyed by the same person at the same time. Taken together, they constitute the law governing the pilotage of steam vessels on the pilot grounds of the Columbia river, below Astoria.

By virtue of the acts of Congress a steam vessel, "when under way," elsewhere than "upon the high seas"—that is, beyond the territorial jurisdiction or dominion of the United States—must be under the control of a pilot licensed by the United States inspectors. This provision is imperative, a pilot without such license is not authorized to pilot such vessel. But a pilot with this qualification alone, is not, so to speak, a full pilot, on these pilot grounds. Before he is authorized to *offer* his services to such vessel, and in case of refusal, to demand whole or half pilotage, as the case may be, he must also be qualified under the State laws.

This conclusion accords with the following suggestion made by this Court in *The Panama*:

"The law [act of 1852] only so far abrogates the State law as to require that a steam vessel carrying passengers, shall have a pilot licensed by its authority, and to prohibit any pilot without such license from serving as pilot on such vessel. The compensation of pilots, the mode and manner of offering their services, until Congress sees proper to provide for them, still remains legitimate subject for State legislation. The bar pilot, licensed by the State, may apply to the United States inspectors for license to pilot steam vessels, and, if found competent and licensed, may pilot such vessels."

This disposes of the case upon the merits. The libellant being qualified under both the National and State law, was the first pilot so qualified to hail the Wright and offer his services as a pilot. His offer being refused by the master, he is entitled to recover half pilotage. By the State pilot

The George S. Wright.

law, approved October 27, 1868, the fees for pilotage were reduced, so that the libellant is only entitled to \$36 instead of \$46 as claimed for each voyage.

The answer of the claimant also contains an article in the nature of a peremptory exception to the libel. This allegation is to the effect, that the State law giving half pilotage expressly makes the consignee of the ship liable therefor in case the master omits or refuses to pay the same, and that therefore the vessel is not liable also for the demand. But I do not think the statute can or ought to have such a construction.

A claim for half pilotage given by statute for services offered and refused, so far as the remedy is concerned, stands upon the same footing as an ordinary claim for pilotage. The transaction out of which the libellant's claim arises, is one from which the law will imply a contract to pay the pilotage given by statute, as a compensation for the offer of services with a present ability to perform. (*Steamship Co. v. Joliffe*, 2 Wall. 456.)

Claims for pilotage are cases of admiralty jurisdiction, and the suit therefor may be against the vessel or against the master or owner, or both. (Ben. Ad. 289, 391.) The law of the State cannot take away or limit the admiralty jurisdiction of this Court, if it would. On the other hand it is evident that the remedy given by the local law against the consignee was intended to be cumulative and not restrictive. A claim for half pilotage against an outgoing vessel, without an owner resident in this district, might otherwise be practically incapable of recovery. To meet such a case, the pilot act of the State gives the pilot an additional remedy against the consignee—a person supposed to be resident in the port.

As has been shown the law of this case is with the libellant. The legislation upon the subject of pilots and pilotage is practically still left with the States—except that, so far as steam vessels are concerned—the pilot must be licensed by United States inspectors.

But it is to be regretted that Congress has not gone farther in the exercise of its undoubted powers to regulate com-

In re J. J. Walton and C. W. Walton.

merce both foreign and domestic, and established some uniform rules in regard to the amount and mode of payment of pilots fees. The regulations made by the State are generally at the instigation and in the special interest of the local pilots and at the expense of steam vessels, especially if owned without the district. In such cases, at least, where pilotage is ordinarily a mere tax for nominal and unnecessary services, the United States inspectors with the supervising inspector ought to be authorized to prescribe and establish the fees for pilotage.

There must be a decree given for the libellant for the sum of \$72 and costs and expenses of suit.

Joseph N. Dolph, for libellant.

Erasmus D. Shattuck, for claimant.

DISTRICT COURT, JULY 12, 1869.

*In re J. J. WALTON AND C. W. WALTON.**

Where a creditor takes a preference from an insolvent debtor, with reason to believe that such debtor was then insolvent, and intended to evade the provisions of the Bankrupt Act by preventing his property from being distributed thereunder among his creditors, such creditor is barred from proving his debt, and may be compelled to restore property so taken, to the assignee.

The Bankrupt Act does not trust the legal rights of one portion of the creditors of an insolvent to the judgment or good intentions of another portion, and therefore it makes no difference with what ultimate intention a creditor takes a preference contrary to the act, he thereby forfeits his right to prove his debt.

Objections by the assignee, Joseph Bachman, to the proof of debts by Allen & Lewis and Henry Failing. The objections being similar and depending upon the same facts, they were heard together. Mr. Register Hill, to whom the

*Affirmed on appeal to the Circuit Courts, May 4, 1870.—*Sawyer, J.*

In re J. J. Walton and C. W. Walton.

matter was referred, found the following conclusions of fact and law:

1. On the 27 of June, 1868, J. J. & C. W. Walton, being then partners under the name of J. J. Walton & Son, were indebted to these creditors as follows: To Allen & Lewis, \$3,982.64; to Failing, \$2,002.33; which indebtedness was for goods sold to said J. J. Walton & Son.

2. That at the same date, said J. J. Walton & Son were largely indebted to divers other persons, most of them residing at Portland, Oregon, for goods sold them.

3. That at that time said J. J. Walton & Son were insolvent.

4. That on said 27 day of June, these creditors, Allen & Lewis and Failing, by their agent and attorney, E. D. Shattuck, at Eugene City, Oregon (the place of business of said Walton & Son), procured the said firm of J. J. Walton & Son to confess judgments in their favor for the amounts due them respectively, in the Circuit Court of the State of Oregon for the county of Lane.

5. That on the 29 day of June, 1869, those creditors Allen & Lewis and Failing, caused executions to be issued upon the judgments so confessed, and directed the sheriff to seize the property of said J. J. Walton & Son upon those executions, and to act under the directions of J. B. Underwood as to further proceedings, and at the same time sent instructions by mail from Portland to Underwood at Eugene City, to the effect that it was not their intention to get any preference in the final distribution of the moneys to be made by the sale of the property, but that it was their intention to avoid the expense of a division of the moneys under the bankrupt law; and further instructing him to have the sheriff turn over the property to any agent whom the creditors might agree upon to sell the same and distribute the money, or to the marshal in case proceedings should be instituted under the bankrupt law, and the marshal as messenger should be directed by the Court of bankruptcy to seize the property.

6. That at the time of taking of said judgment by con-

In re J. J. Walton and C. W. Walton.

fession, and at the time of causing said executions to be issued, and at the time the property was seized upon said executions, these creditors, Allen & Lewis and Failing, knew that J. J. Walton & Son were insolvent; that is, could not pay all their debts in full, and their debts could not be paid in full upon sale of all their property under execution.

7. That on the 2d day of July, 1868, proceedings were instituted by order of the creditors of said Walton & Son, to have them adjudged bankrupts, and that on the 28th day of July, 1868, they were adjudged bankrupts by this Court upon the proceedings so instituted.

8. That these creditors, Allen & Lewis and Failing, made no resistance to the marshal seizing the property levied upon under their said execution; and that with their offer to prove their debts they also offer to surrender any advantage or preference which they may have obtained by their said proceedings against said J. J. Walton & Son.

And, upon these findings of fact, I find as a conclusion of law, that these creditors, Allen & Lewis and Failing, should not be allowed to prove their debts, but that their claims should be rejected, and they be adjudged to pay the costs of this proceeding.

In support of his conclusions, the Register filed the following opinion, which, being adopted by the Court, is here inserted:

OPINION OF REGISTER.

On the 27th day of June, 1868, Walton & Son, merchants, doing business in copartnership at Eugene City, Oregon, being indebted to Allen & Lewis, merchants of Portland, in the sum of \$3,982.33, and to Henry Failing, merchant of Portland, in the sum of \$2,002.64, confessed judgments in favor of these creditors respectively, for the amounts of their respective demands. At that time Walton & Son were largely indebted to others, amounting in all to over \$10,000, and were insolvent.

These judgments were confessed after some pressure from the creditors, Allen & Lewis and Failing. That Walton & Son were at that time insolvent is not questioned; and I

In re J. J. Walton and C. W. Walton.

cannot but conclude that these creditors knew of such insolvency. They offer to prove their claims against the estate; and the depositions they offer for such proof go beyond the forms prescribed by the Supreme Court, and contain a large amount of matter in regard to taking the judgments, which I suppose is intended to exculpate these creditors from any charge of violating the bankrupt law in taking the confessions of judgments; and among other things, these creditors say in their depositions for proof of debt, that they supposed, when they took the confessions, that if the property of Walton & Son (which consisted of a small stock of goods for retail business) *could be disposed of at its full value and if the debts due Walton & Son could all be collected*, Walton & Son would be able to pay their debts in full. To the same effect is the testimony of Mr. Failing and Mr. Lewis, when on the stand as witnesses. Neither of them pretends to have supposed that Walton & Son were, or would be, able to pay in full, except upon all the contingencies stated above. They were unable to pay on demand, and their property was insufficient to pay in full upon forced sale. This these creditors knew; and this is insolvency. (*In re Randall & Sunderland*, 2 Law Times, 69, decided by the Judge of this Court; *Hastings v. Knox, Assignee*, etc., 1 Law Times, 73; *In re Black*, 1 Bank Rep. 81.)

But these creditors endeavor to rebut the presumption of frauds which the law attaches to this transaction, by stating their own intentions at the time—that they intended only to preserve the assets of Walton & Son from being wasted through the dissipation of young Walton, and would have made a distribution of the proceeds of the property *pro rata* among all the creditors. I think this evidence incompetent. It would be an alarming proposition to lay down as a rule for the guidance of courts of justice, that a man may, in express violation of the statute, seize and appropriate wholly to himself that of which the larger portion belongs to others, and then, when overtaken by the law, escape its penalties by saying he never intended any fraud; he did not intend to use the advantage which he had thus gained, to another's

injury. Some persons might—as I suppose these creditors may have intended to do—make a just and equitable division of what they had obtained; but these would be the exceptions, and the rule would be that the rapacious and unconscientious creditors of every insolvent debtor would seize all his assets regardless of the rights of other creditors; and then, if prevented by the law from depriving the other creditors of any part of the estate, would pass out at this convenient and wide door of escape, carrying with them all the rights of innocent men, notwithstanding the penalties denounced against their acts by the statute. The law does not leave the *rights* of one man to the *generosity* of another.

These creditors further seek to show that they had conversations with other creditors almost immediately after taking the confessed judgments, and before issuing execution, in which their entire good faith, and their intention to make a just distribution, were expressed to such other creditors. This evidence is objected to on the part of the assignee. It is not pretended on the part of A. & L. and F. that there was any agreement between all the creditors, that the estate of Walton & Son should be wound up in the way suggested; and unless these conversations amounted to a mutual agreement of that kind, by which all parties interested in the estate might be estopped to object to it afterwards, I cannot see how the conversations affect the case. They are therefore excluded.

The creditors, A. & L. and F., on the 29th day of June, two days after the judgments were confessed, caused executions to be issued thereon, and the property of Walton & Son is to be seized. On the same day they sent written instructions to J. B. Underwood, an attorney, at Eugene City, by mail from Portland, directing him to have the sheriff hold the property under the executions, subject to an arrangement they wished to make to have it disposed of for the benefit of all the creditors, and to have the property turned over to such agent as the creditors might agree upon, *to avoid the expense of having it distributed under the bankrupt*

law; and, further, to have it delivered up to the messenger, if proceedings were instituted in the Court of Bankruptcy. This was after these creditors were informed that the other Portland creditors had sent an agent and attorney to Eugene City to see about their claims against Walton & Son. Indeed, the prime object in taking these confessions of judgment and all the proceedings under them, seems, upon the construction most favorable to these creditors, to have been to avoid a distribution of the assets of Walton & Son under the bankrupt law. This appears from the testimony of Mr. Shattuck, the agent and the attorney who procured the judgments, as well as from the instructions to Underwood. Such a transaction, "assignment, transfer, conveyance," etc., "or warrant to confess judgment," made to defeat or hinder the operation of the bankrupt law, and within six months before the filing of a petition by a creditor for adjudication of bankruptcy against the debtor, is a fraud upon the law, and an act of bankruptcy (§ 39); and if made to a person who knows or has reasonable cause to believe the debtor is insolvent, or that a fraud upon the act is intended, it brings upon such person the penalties and disabilities of a participant in the fraud (§ 39); namely, the liability to an action for the property so transferred, assigned or conveyed, or its value, and the exclusion from any participation in the dividends that may be declared to the creditors of the estate.

The direction to Underwood to have the sheriff deliver the property of Walton & Son to the messenger, in case proceedings in bankruptcy should be instituted, was only a direction to do without resistance that which he could have been compelled to do if he had refused; and can have no influence in the case, unless it be to disclose the reason for the preceding instructions; the desire to escape the imputation of fraud which the law puts upon their acts.

Walton & Son were adjudged bankrupts on the 28th day of July, 1868, upon the petition of one of their creditors, these judgments and executions being the acts upon which the adjudication was founded.

In re J. J. Walton and C. W. Walton.

These creditors, A. & L. and F., propose now to prove the debts upon which the judgments were taken, and offer to surrender any advantage they may have acquired by the judgments or executions, and take their distributive shares in the estate, as if such preference had never been taken.

This presents the question: Can a creditor who, within six months before a petition for adjudication of bankruptcy is filed by another creditor, has taken a preference knowing the debtor to be insolvent, surrender his preference and take his place with other creditors, and receive the dividends as if such preference has not been taken?

The Bankrupt Act (§ 39), as it stood at the time of these transactions, provides that any insolvent person who shall give any fraudulent preference by "transfer or conveyance of any money, property or other thing, or shall *give any warrant to confess judgment, or procure or suffer his property to be taken on legal process*, shall, upon the petition of one or more of his creditors, whose provable claims amount in the aggregate to \$250 or more, be adjudged a bankrupt, providing such petition be brought within six months after the act of bankruptcy is committed; and if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, assigned," etc.; "*provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.*"

Who is meant by "such creditor" in the last clause above quoted? The plain and obvious meaning, construing this section alone, is the creditor receiving such preference: "such creditor" is "the person receiving such payment, conveyance," etc.

But it is claimed that section 23 allows a creditor who has taken a preference in fraud of the act—constructive fraud—to prove his debt upon surrendering all advantages of the preference; and that these two sections must be construed together. And it is said that this construction is the only one which can reconcile the provisions of section 23 with

In re J. J. Walton and C. W. Walton.

those of 39, above cited. But I do not think that is correct. To construe them thus would not reconcile them, but would wholly annul the last clause in section 39. A construction which renders any part of a statute inoperative should not be adopted if any other can reasonably be given. (*McCartee v. Orphan Asylum*, 9 Cow. 437.) In this case the statute may be so construed as to avoid the apparent conflict between sections 23 and 39, and give effect to each; a construction, indeed, which gives the language used in the two sections its natural and ordinary import.

Section 23 provides that any person receiving a preference "*after the passage of this Act*," having knowledge or reasonable cause to believe that the debtor is insolvent, shall not share in dividends without surrendering his preference to the assignee for the benefit of all the creditors.

Section 39 is the first section making provision for involuntary bankruptcy—adjudication upon creditor's petition—and denies the right to share dividends or prove claims to any creditor who has taken such preference "*within six months*" next preceding the commencement of the proceedings in bankruptcy by a creditor. I think section 39 operates as a *limitation* of the provision in section 23, and limits its application to cases where the preference is received in fraud of the act, more than six months prior to the filing of a petition for adjudication of bankruptcy by a creditor. If the preference is received more than six months before the petition is filed, or the adjudication of bankruptcy is made upon the debtor's own petition, the creditor may surrender his preference and prove his debt, notwithstanding the preference was constructively fraudulent; but if the preference was taken within six months, and the adjudication is upon the petition of one or more creditors, the preferred creditor cannot prove his debt nor share in dividends. This construction should not be rejected merely because it may in some cases—as I believe it may in the present case—work a hardship upon creditors who intend only to use such diligence as will secure their own and other creditors' distributive shares in the estate. Considerations of this character

In re J. J. Walton and C. W. Walton.

ought not to induce a Court to put a subtle and forced construction upon statutes, contrary to their plain and obvious import. (*Waller v. Harris*, 20 Wend. 555; *McClusky v. Cromwell*, 11 N. Y. 593.)

The conclusion, therefore, at which I have arrived, is that these creditors, A. & L. and F., can not be allowed to prove their debts against the estate of the bankrupts. This conclusion rests not alone upon what seems to me to be the true construction of the bankrupt law; the same construction was placed upon these two sections by the District Court for the Wisconsin District, *In re Princeton* (1 Law Times, 127), in which the Court, after a somewhat extended examination of the question and of the reasons for this provision in regard to involuntary bankruptcy, says: "It can not be permitted to a creditor who, with reasonable knowledge, has participated in such fraud on the act as to found a proceeding against his debtor, to relinquish his intended preference and claim to prove his debt under the 23d or any other section of the Bankrupt Act."

Another objection to the proof of these claims, urged by the counsel for the assignee, is that the confessed judgments, being void by section 35 of the Bankrupt Act, can not be the basis of claims against the estate; and that, though void as to the Bankrupt Act, these judgments were valid under the State laws, and therefore the original debts, being merged in the judgments, can not be the basis of claims against the estate. If this were the only objection, I should have to admit the claims to proof. This reasoning seems to me to be artificial and unsound. It is a maxim of the law that "a void act is no act;" and if these judgments are void as to the bankrupt law, they have no effect to merge the claims upon which they are founded, as to the bankrupt law. But I think these judgments, if void under section 35, are void for all purposes. The language is that such preferences are "void"—not "void as to the Bankrupt Act." There are the strongest reasons why this provision should have been made, and why the broadest language possible should have been used in the law. The only way in which the law can be

In re J. J. Walton and C. W. Walton.

made to operate equally upon all creditors whose debts were originally—in their nature—provable in bankruptcy; the only way to make the system a “uniform system of bankruptcy,” was to make these preferences void to all intents and purposes. And such was the decision under the bankrupt law of 1841, upon language identical with the wording of the 35th section of the law of 1867. (*McLean, Assignee, etc. v. The Lafayette Bank et al.*, 3 McLean’s Report, 185.)

There are some other questions raised in the written arguments submitted to me, but I deem it unnecessary to consider them at this time.

DEADY, J. I concur in the conclusions of fact and law as found by the Register and in his opinion in support thereof.

When the question was first raised as to the right of Allen & Lewis and Henry Failing to prove their debts, I inclined to the opinion that a creditor who had taken a preference contrary to the act, might in *any* case be allowed to prove his debt upon the surrender of the property, benefit or advantage obtained by him under such preference, as provided in section 23. But after long and careful deliberation, I am forced to come to a different conclusion. I am now satisfied that to allow these creditors to surrender their unlawful preference, and come in and prove their debts under section 23, would be to violate both the letter and spirit of the act. It may be admitted that section 23 is of general application, in both voluntary and involuntary cases, except as otherwise provided in section 39. But the special provision in the latter section, declaring that a creditor shall not be allowed to prove his debt in a *particular case*, so far, excludes the operation of the general words of the former. Now this special provision of section 39 covers this case at every point, and therefore takes it out of section 23.

Walton and Son, being insolvent, confessed a judgment, and procured and suffered their property to be taken on legal process, with intent to give a preference to A. & L. and H. F. This being the case, the section declares, that if the person receiving such preference “had reasonable cause to

In re J. J. Walton and C. W. Walton.

believe that a fraud on the act was intended or that the debtor was insolvent," that the assignee may recover back the money or property paid or transferred contrary to the act, and that "such creditor"—that is, the creditor receiving such preference, with reasonable cause to believe, etc.—"shall not be allowed to prove his debt in bankruptcy."

These creditors, by their agent, had not only reason to believe, but knew, that at the time of giving this preference, Walton and Son were insolvent, and that in so doing they intended a fraud upon the act—that is, intended to evade its provisions by preventing their property from being distributed among their general creditors under it.

To these acts or conduct, section 39 attaches certain consequences: First—The preferred creditors may be *compelled* by the assignee to restore the money or property received under the preference. Second—Such creditors are prohibited from proving their debts in bankruptcy.

The first of these provisions is remedial, and furnishes the means whereby the wrong committed in giving and receiving a preference may be corrected. But the second is preventive, and intended to deter creditors from receiving preferences for fear of losing or forfeiting their debts thereby. Of the two it is the more important and more likely to prevent violations or evasions of the act in this respect.

The liability to these consequences or penalties arises upon the same facts—the creditors taking a preference contrary to the act—but the right to enforce the one does not depend upon the enforcement of the other. They are distinct and cumulative. The assignee may recover back the money or property without objecting to the proof of debt, or the proof of debt may be excluded where there has been no such recovery.

What use these creditors may have ultimately intended to make of their preference is immaterial. Let it be admitted that they intended so far as they know, to share the proceeds of their executions with their fellow creditors, *pro rata*. The law does not trust the legal rights of one portion of the creditors to the judgment or good intentions of the

James B. Newby v. The Oregon Central R. Co. *et al.*

others. While, as a matter of fact, it may have been safe to do so in this case, in a majority of others it might or would not. Besides a mere intention or even proposition on their part to admit the rest of the creditors to a share of the property was not a contract with such creditors which the latter could enforce. Such intention or proposition could have been changed or withdrawn by A. and L. and H. F. at any time before it was realized or accepted, with impunity.

In legal effect, the transaction as claimed by these creditors, was nothing more or less than obtaining a preference contrary to the act, with intention to make such arrangement with the general creditors as the parties taking the preference might think proper under the circumstances. This would be to make themselves judges in their own case.

An order will be made rejecting these claims, and directing the Register to refuse to allow them to be proved, and that A. and L. and H. F. be adjudged to pay the costs and expenses of this proceeding.

M. W. Fechheimer, for assignee.

Erasmus D. Shattuck, for creditors.

CIRCUIT COURT, AUGUST 3, 1869.

JAMES B. NEWBY *v.* THE OREGON CENTRAL RAILWAY CO., GEORGE L. WOODS, E. N. COOKE, J. H. DOUTHITT, I. R. MOORES, T. McF. PATTON, JOHN H. MOORES, JACOB CONSER, A. LAWRENCE LOVEJOY, F. A. CHENOWETH, S. ELLSWORTH, STEPHEN F. CHADWICK, JOHN E. ROSS, J. H. D. HENDERSON, JOHN F. MILLER, A. F. HEDGES, S. B. PARRISH AND GREEN B. SMITH.

The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a Court of equity.

James B. Newby v. The Oregon Central R. Co. *et al.*

A corporate name is a necessary element of a corporation's existence, and any act which produces uncertainty or confusion concerning such name, is well calculated to injuriously affect the identity and business of the corporation.

The right to a corporate name does not rest in parol, but is shown by the record and is triable by inspection thereof in any form of proceeding—therefore a Court of equity will not refuse to enjoin the use of such name because the right to the same has not been established at law.

The jurisdiction to enjoin the use of a corporate name does not depend upon the insolvency of the defendant.

The insolvency of a corporation, the legality of the subscription to its capital stock, and the validity of its organization generally, may be judicially investigated, whenever and wherever such investigation becomes material to the determination of the rights of third persons, who are parties to a judicial proceeding before the Court.

Where a creditor of a corporation, as a bondholder, has a lien upon a grant of land or other property owned or claimed by such corporation, and another corporation is wrongfully using such corporation's name for the purpose of obtaining such grant of land, such creditor may maintain a suit in equity to enjoin such other corporation from such wrongful use of his corporation's name.

An agreement by a corporation to prefer its bondholder in the disposition of 50 per centum of the proceeds of its lands, which may be sold before such bond becomes due, does not give such bondholder a lien upon the corporation lands.

Quere, can a mere bondholder of a corporation maintain a suit to enjoin another corporation from doing unlawful acts which depreciate the conventional value of such bond in the market.

In a suit to enjoin the use of a corporate name, the corporation whose name is alleged to be wrongfully used must be a party plaintiff or defendant, but if such corporation refuse to bring such suit upon request, its bondholder or creditor may do so, and make such corporation a party defendant.

DEADY, J. This suit is brought to enjoin the defendants from using the name—"The Oregon Central Railway Co.," and from issuing bonds bearing said name. It was commenced on February 9, 1869. The defendants on April 5, filed ten exceptions to the complaint for impertinence, which exceptions, after arguments by counsel, were disallowed on April 12th thereafter.

On May 3, 1869, the defendant corporation demurred to the complaint, as did the other defendants, by a separate and similar demurrer.

On May 15 and 22 the demurrer was argued by counsel and the cause submitted to the Court for determination.

James B. Newby v. The Oregon Central R. Co. *et al.*

Substantially, the allegations of the complaint are as follows:

I. That the complainant is a citizen of California and the defendants are all citizens of Oregon.

II. That the corporation defendant was organized about April 22, 1867, under the laws of the State of Oregon, with its place of business at Salem, for the purpose, as expressed in its articles, of constructing and operating a railway for the transportation of passengers and freight from Portland in a southerly direction about three hundred miles, to the northern line of the State of California.

III. That long prior to the incorporation of such defendant corporation, another corporation was duly incorporated under the laws of Oregon, under the name of "The Oregon Central Railway Co.," for the purpose as expressed in its articles of constructing and operating a railway from Portland, in a southerly direction, about three hundred miles, to the northern line of the State of California, under the laws of Oregon and the act of Congress, approved July 25, 1866, entitled "An Act granting lands to aid in the construction of a railway and telegraph line from the Central Pacific Railway to Portland, Oregon," and the amendments thereto; and that about October 1, 1866, the articles of this corporation were published in full in sundry newspapers then published in Portland, Salem, Eugene, and elsewhere in Oregon, and that about October 11, 1866, the Legislative Assembly of Oregon, after hearing the articles of this corporation read before it, and upon the application of said corporation, did, by the passage of a joint resolution, namely, House Joint Resolution No. 13, designate and appoint this corporation to receive and manage so much of the land and franchises proposed to be granted by said act of Congress, as should lie within the State of Oregon, which designation and appointment was in all respects regular and in accordance with said act of Congress.

IV. That thereafter, and within the time prescribed by said act of Congress, said last named corporation duly gave its assent to the terms proposed by said act, which

James B. Newby v. The Oregon Central R. Co. *et al.*

assent was duly filed with the Secretary of the Interior of the United States; and such corporation is now proceeding to construct said railway as by said act required, in order to receive the benefits arising therefrom; and that said act of Congress among other things provided, that the company complying with the conditions thereof and being designated therefor by the Assembly aforesaid, should receive twenty sections of the public land within the State of Oregon for each mile of such railway, to aid in the construction thereof, together with the right of way, and other valuable privileges, in the public lands along the line of said railway.

V. That by reason of the matters aforesaid, the last named corporation became possessed of valuable franchises and rights, in consideration of which its credit was established in the principal money markets of the world, so that its bonds and obligations became valuable and marketable commercial paper, by means whereof it was enabled to meet its obligations incurred in the construction of said railway; and that on June 25, 1868, said act of Congress was amended so as to extend the time for the completion of the first and the subsequent sections of said railway; and that said corporation will be able to comply with said act of Congress, and be entitled to receive the land and other franchises proposed to be granted thereby.

VI. That said last named corporation, for the purpose of raising money to construct said railway, issued bonds of the denomination of \$1,000 each, payable in gold coin, to bearer, on January 1, 1869, with forty-one interest coupons attached to each of said bonds, which coupons were payable to bearer, and for the sum of \$35 each, that being the amount of the semi-annual interest on each of said bonds at the rate of seven per centum per annum; and that such bonds were put in market and sold as all such other securities are sold, and that this complainant then and there became the purchaser and is now the holder and owner of two of said bonds; and that said bonds are secured by a first mortgage upon all the real and personal property of said corporation—excepting the subscriptions to the stock

James B. Newby v. The Oregon Central R. Co. *et al.*

thereof—and upon all its rights under said act of Congress, and fifty per centum of the proceeds of any land sold by said corporation before said bonds fall due, and that by reason thereof the complainant's bonds are the most valuable of said corporation's obligations, and would be of great market value but for the wrongful acts of the defendants, as hereinafter stated.

VII. That on about April 22, 1867, certain of the corporators of the last named corporation seceded therefrom and confederated and conspired with other persons for the purpose of defrauding and injuring said corporation, and in pursuance thereof said corporators and other persons, executed the articles of incorporation of the defendant corporation herein, and incorporated and proceeded to organize the same, by the corporate name of "The Oregon Central Railway Co."—that being the name of the corporation designated by said resolution No. 13, as aforesaid; and that the incorporators of said defendant corporation then and there well knew and were duly notified of the prior incorporation of the corporation designated by said resolution No. 13, under the name aforesaid, and of its rights and franchises aforesaid, and that the incorporation of another corporation under the same name would greatly injure the credit of said prior incorporation and depreciate its bonds in the money markets, by causing confusion and misunderstanding as to which corporation was entitled to the rights and benefits guaranteed to "The Oregon Central Railway Co." under said act of Congress and resolution No. 13.

VIII. That said defendant corporation has fraudulently issued a large number of bonds similar in appearance and purporting to be the bonds of "The Oregon Central Railway Co.," and to be secured by a first mortgage upon all the property of said company—except subscriptions to its capital stock—and upon its rights and franchises, and put the same upon the market as the bonds of said O. C. R. Co.; and that said last mentioned bonds were wrongfully issued for the purpose of depreciating and preventing the sale of the bonds of the corporation designated by said resolution

James B. Newby v. The Oregon Central R. Co. *et al.*

No. 13, and destroying their character as marketable securities; and that by reason of the wrongful and fraudulent acts aforesaid, the market value of the complainant's bonds has been greatly reduced, and the same rendered unmarketable; and that said acts have caused the public, particularly bankers and the like, to believe and suspect that the defendant corporation is the one designated by said resolution No. 13, and that said wrongfully issued bonds, and not the complainants, are secured by the mortgage by which the complainant's bonds are in fact secured; and that the putting of said wrongfully issued bonds upon the market as aforesaid, as the bonds of the O. C. R. Co. will cause further depreciation of your complainant's bonds, and cast confusion and suspicion upon and about the bonds of the corporation designated by said resolution No. 13.

IX. That said defendant corporation, by its officers, is threatening to issue, and unless restrained by the Court, will issue a large amount more of its bonds, purporting to be the bonds of the O. C. R. Co., and to be secured as aforesaid, by which complainant's bonds will be further depreciated and their market value destroyed to his damage not less than \$1,000.

X. That the personal defendants above mentioned are all directors of the defendant corporation.

XI. That after the articles of incorporation of the defendant corporation were executed and filed, six of the corporators thereof subscribed \$100, or one share each of the capital stock, and then passed a resolution that the president subscribe all the rest of the stock in the name of and for the corporation, there being then in fact no president, and thereupon, after George L. Woods, as president, had pretended to subscribe said stock as directed, said corporators proceeded to organize said corporation by the election of directors, and the pretended directors, so elected, then elected said Woods president, but that no other subscription to said capital stock has ever been made; and that said defendant corporation has no other property than the six shares of capital stock, subscribed as aforesaid, and is

James B. Newby v. The Oregon Central R. Co. *et al.*

therefore wholly unable to respond to complainant in damages.

With prayer of special relief as follows:

That the defendants be perpetually enjoined from the further use of the name, "The Oregon Central Railway Co.," and from issuing any more of such bonds, and such other and further relief, etc.

The causes of demurrer assigned in the demurrers of record substantially are:

1. That the bill is defective because it does not contain a prayer for process.
2. That the complainant has a plain and adequate remedy at law.
3. That it does not appear that the legal right of the last named corporation to the name—"The Oregon Central Railway Co."—has been established at law.
4. That complainant has not sufficient interest in the subject matter to maintain this suit or to the relief prayed for.
5. That the bill does not state facts sufficient to constitute a cause of suit.
6. That the complainant by his bill has not shown a case for relief in equity against the defendants.

On the argument the following additional causes of demurrer were assigned *ore tenus*.

7. That it does not appear from the bill, that said last named corporation had refused to institute this suit, and therefore it should have been brought in the name of said corporation.

8. That this Court has no jurisdiction of this suit because the subject matter in dispute does not exceed the value of \$500.

By the law of Oregon any three or more persons may incorporate themselves for the purpose of engaging in any lawful enterprise or occupation. The primary step in the formation of this legal entity is the execution and filing of articles of incorporation, which articles, among other things, must specify—"The name assumed by the corporation and by which it shall be known." (Or. Code, 658-9.)

James B. Newby v. The Oregon Central R. Co. *et al.*

By the execution and filing of these articles, the corporate name assumed thereby and specified therein, becomes exclusively appropriated. If afterwards any persons attempt to incorporate for any purpose by the same name, this would be an encroachment upon the rights of the first corporation, and therefore illegal. To prevent the continuance of such a wrong upon the rights of another equity will interfere at the suit of the injured party, by injunction. The case is analogous to if not stronger than that of a piracy upon an established trade mark. (*Bell v. Locke*, 8 Paige 75; *Taylor v. Carpenter*, 11 Paige 292; *Partridge v. Menck*, 2 Barb. Ch. 102; Wil. Eq. 402-3.) The corporate name of a corporation is a trade mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a Court of equity.

Under the law, the corporate name is a necessary element of the corporation's existence. Without it, a corporation cannot exist. Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree at least, the natural and necessary consequence of the wrongful appropriation of a corporate name, is to injure the business and rights of the corporation by destroying or confusing its identity. The motives of the persons attempting the wrongful appropriation are not material. They neither aggravate or extenuate the injury caused by such appropriation. The act is an illegal one and must, if necessary, be presumed to have been done with an intent to cause the results which naturally flow from it. Nor will a Court of equity refuse to enjoin the wrongful appropriation of a corporate name until the right of the first corporation to the name has been established by the verdict of a jury in an action at law. Such right does not rest in parol but is shown by the record, if at all, and is determined by the Court in any form of proceeding. Neither in such case, has the party injured an adequate and complete remedy at law. As in the case of patents for inven-

James B. Newby v. The Oregon Central R. Co. *et al.*

tions and copyrights, the remedy at law can only give redress for the past injury, and that often inadequately. But to protect the injured corporation from the mischief arising from continued violation of its rights and perpetual litigation concerning them, resort must be had to the equitable remedy by injunction. (Story's Eq. § 930.)

Nor do I deem it material in this case to the jurisdiction in equity, that the defendant should be insolvent—unable to respond to the complainant in damages. The jurisdiction in this class of cases—trade marks, patents and copyrights—depends upon the fact that the matter is intrinsically of equitable cognizance—that the legal rights of the party can only be protected in equity, and not upon the uncertain and irrelevant test of the insolvency of the defendant.

For this reason as well as the conclusion I have reached upon the rights of this complainant to maintain this suit, without the O. C. R. Co. being made a party thereto, it is not necessary to consider the question made in the complaint as to the insolvency of the defendant corporation upon the grounds of the alleged illegality of the subscription to its capital stock and the irregularity of its organization. It will not be out of place, however, to remark in passing, particularly after the argument of counsel for defendant upon that point that if any such question were to become material in this suit, *for the purposes of this suit*, it could be investigated and determined here as well as in any other proceeding. There is no divinity that doth hedge about the affairs of a corporation so as to preclude a judicial investigation of the facts concerning it, whenever and wherever such investigation becomes material to the determination of the rights of third persons. For instance, if it were necessary for the maintenance of this suit for the complainant to show that this defendant or any other corporation was insolvent, he would be allowed to do so, even if it were necessary in so doing to show that its capital stock was illegally subscribed or that its organization was invalid. The age or solvency of A B may become material questions in a suit to which he

James B. Newby v. The Oregon Central R. Co. *et al.*

is not a party and in which he has no interest, but that does not preclude the parties interested and litigant from investigating the matter for the purposes of their controversy.

And this brings me to the consideration of the questions—has the complainant such an interest in the subject of this controversy as entitles him to maintain this suit; and if this question is answered in the affirmative, can he maintain the suit without making the O. C. R. Co. a party plaintiff or defendant.

It being admitted by the demurrer that the complainant is a bondholder and a creditor of the O. C. R. Co., and that the corporation defendant has wrongfully appropriated the corporate name of said corporation, and is issuing bonds in said name, and is seeking by the wrongful use of such name to obtain the land granted to the O. C. R. Co., if it also appeared unqualifiedly that the bonds of the complainant were secured by a mortgage upon land granted by act of Congress to the corporation designated by the Resolution No. 13, I think he would have such a special interest in that property as would entitle him to maintain a suit to prevent another corporation from obtaining the same land by the wrongful use of the name of the corporation whose bonds he holds. (*Bradley v. Richardson*, 2 Blatch. 345.)

But upon this point the complaint is equivocal, or at least indistinct. It does not directly state that *this* land is mortgaged to secure the payment of the complainant's bonds. True, it is averred that the mortgage is upon *all* the property of the corporation; except subscriptions to its capital stock. What other property, if any, than these subscriptions and this land the corporation claims, is not shown. Now, as to the land, the complaint states specially that the mortgage is upon the *rights* of the corporation under the act of Congress, and upon fifty per centum of the proceeds of such of the lands thereby granted as may be sold before the bonds become due in 1889. Waiving the question of whether the corporation can mortgage these lands before the performance of the conditions on which the grant was

James B. Newby v. The Oregon Central R. Co. *et al.*

made, and before they are selected and separated, by the proper authority from the body of the public lands, this allegation rather indicates an agreement by the corporation in the disposition of the proceeds of this land sold before 1889, to prefer its bond creditors as to fifty per centum thereof, than a mortgage upon the land itself.

But counsel for complainant does not rest his right to relief upon this ground alone. He maintains that the complainant is something different from, and more than, a mere creditor of the O. C. R. Co., secured by a lien upon its property. That he is also the owner of its bonds—a species of obligation or security, which, in the progress of society and business, have acquired a conventional value, as *property*. That this conventional value depends upon the state of public opinion as to the resources and prospects of the corporation that issued these bonds, and thereby created this property; and that the issuing of similar bonds in large numbers, in the name of the O. C. R. Co. by the defendant corporation, works an injury to the complainant by diminishing the conventional or market value of his property.

This argument is not without force and plausibility. No authority has been cited, however, in support of the conclusion, and I do not deem it necessary to express an opinion at this time upon the question made by it. For, admitting that the complainant is entitled against the defendants to the relief prayed for, either on the ground of his being the owner of the O. C. R. Co.'s bonds, or a creditor of such corporation with a lien upon its lands for security, yet I am satisfied that this suit cannot be maintained without the O. C. R. Co. being made a party, plaintiff or defendant. Upon authority and principle, the corporation whose name is alleged to be wrongfully assumed and used, must be a party to the suit. If such corporation refuses to bring the suit after being requested to do so, the complainant may sue, and alleging the fact in his complaint, make the corporation a party defendant. (*Robinson v. Smith*, 3 Paige Ch. 232; *Dodge v. Wolsey*, 18 How. 331.)

The Fideliter.

The demurrer *ore tenus*, for want of proper parties is therefore allowed upon payment by the defendants of the costs of the demurrer on the record. (3 Page Ch. *supra*.)

W. Lair Hill, for complainant.

Joseph N. Dolph, for defendants.

DISTRICT COURT, SEPTEMBER 20, 1869.

THE FIDELITER.*

Where the owner of a vessel makes a bill of sale thereof without consideration, to another, and retains the possession of such vessel, for the purpose of fraudulently obtaining an American register for the same, such transaction is a nullity and does not vest any legal title or right in the pretended vendee, so as to authorize the statement in the oath for a register under section 4 of the act of December 31, 1792 (1 Stat. 287), that he is the true and only owner thereof.

A sale of a British vessel by an American citizen to a Greek subject, at Alaska, after the ratification of the treaty of purchase with Russia, and before the country was formally turned over to the American government, for the purpose of having such vessel thereby become an American bottom under article 3 of said treaty, is a fraud upon the American government, and an American register obtained for such vessel thereon, is fraudulently obtained within the meaning of section 24 of the act of July 18, 1866 (14 Stat. 184).

DEADY, J. This is a suit for the condemnation of the steamship *Fideliter*, as being forfeited to the United States for the violation of section 4 of the Registry Act of December 31, 1792 (1 Stat. 287), and section 24 of the act to prevent smuggling, etc., of July 18, 1866 (14 Stat. 184).

The libel was filed by the district attorney on behalf of

*Reversed and libel dismissed on appeal to the Circuit Court, because it did not appear from the libel that there had been a seizure of the vessel before the commencement of the suit: May 4, 1870, SAWYER, J., citing *The Ann*, 9 Cranch, 289; *The Silver Spring*, 1 Sprague, 551; *The Octavia*, 1 Gall. 488; *The Josefa Segunda*, 10 Whea. 312; *Keene v. United States*, 5 Cranch, 305; *Gelston v. Hoyt*, 3 Whea. 318; Ad. Rule 22.

The *Fideliter*.

the United States, on December 27, 1867, praying that said vessel, her tackle, etc., might be adjudged forfeited to the United States for the reasons and causes therein alleged. The libel substantially charges:

I. That the *Fideliter* is an ocean steamship of 175 $\frac{15}{100}$ tons burden; that she is not an American vessel, but is a British bottom, built in some British port to the libellant unknown, and has since sailed under the British flag and is not entitled to sail under any other, and that William Kohl is the sole owner thereof, and has been such owner since April, 1867.

II. That between the middle of May and June, 1867, the said Kohl took said vessel from the port of Portland-on-Wallamet, to Sitka, in Alaska, with the intent to there make a sham or pretended sale thereof to some Russian subject, so as to enable said Kohl to obtain an American certificate of registry for said vessel under the treaty of purchase concluded between the United States and Russia, on March 30, 1867; and that between June and November, 1867, said Kohl did make a sham sale of such vessel to one Joseph Lugebil, a Russian subject; and that such Lugebil is now, was then and has been for a long time in the employ of the Emperor of Russia as interpreter, and was without means, and paid no valuable consideration or thing whatever for such purchase.

III. That in order to obtain the registry of said vessel under the laws of the United States, and the treaty of purchase aforesaid, and with the intent to obtain such registry, the said Kohl, on October 28, 1867, at the port of Sitka aforesaid, appeared before William S. Dodge, the collector of customs for said port, and solemnly affirmed that said Lugebil was then and there the owner of said vessel; and that the matter of fact in said affirmation, to wit: that Lugebil was the sole owner of such vessel, was, within the knowledge of said Kohl, not true, but the same was false and untrue; and that within the knowledge of said Kohl, he, the said Kohl, was then and there the sole owner of such vessel, and not Lugebil.

IV. That said Kohl, on the date and at the port last aforesaid, and in the manner and by the means aforesaid, did unlawfully and fraudulently obtain from the collector aforesaid, a certificate of registry of said vessel; which register so obtained has been wrongfully and improperly used for said vessel ever since.

On the filing of the libel a warrant of arrest was issued against the vessel, upon which she was seized by the marshal on the same day while lying at this port.

On December 28, 1867, William Kohl appeared and filed a petition, praying that the vessel be delivered to him on bond, in which petition he represented himself as the "agent of the owners" of the same. On the same day the vessel was released, upon the bond of said Kohl and his sureties, to pay the agreed value thereof—\$30,000—in case she was condemned as forfeited by the decree of this Court. On January 4, 1868, Kohl filed a claim of ownership of the vessel, without verification, in which he alleged that he was "the agent of the persons who are the true and *bona fide* owners thereof," without naming or otherwise indicating who such persons were.

These particulars concerning the claim of ownership are noticed for the purpose of calling attention to the irregularity of releasing the vessel to Kohl before a claim of ownership was made in the case, and to the fact that the claim of ownership made by Kohl was as agent for "persons" and "owners"—more than one—while in the answer filed by him the same day, as the agent of Lugebil, it is alleged that Lugebil is the sole owner.

On January 4, 1868, Kohl, as the agent of Joseph Lugebil, answered the libel in substance and legal effect as follows:

I. Admits that the Fideliter was a British built vessel and sailed under that flag; but avers that on October 28, 1867, she became and has ever since been an American vessel, by virtue of the United States laws, relating to shipping and the treaty of purchase aforesaid. Denies that Kohl is or ever was the owner in whole or in part of said vessel.

Admits that the owner of said vessel took her from the port of Portland-on-Wallamet to the port of Sitka, as alleged in the libel; but denies that he took her there for the purpose of making a sham or pretended sale to a Russian subject, with a view of obtaining an American register therefor, as alleged in the libel.

II. That about June 6, 1867, John Dutnell, a British subject was, and for some time prior thereto had been the owner of said vessel; and that about said date said Dutnell, by said Kohl, his attorney in fact, duly sold, conveyed and transferred said vessel to the claimant, Joseph Lugebil, who was at that time a Russian subject, living at Sitka, aforesaid, and employed there as bookkeeper by the Russian American Fur Company, a corporation then existing under the laws of Russia; and that in pursuance of such sale, a bill of sale of said vessel was then and there duly executed and delivered to the claimant; who thereupon came into possession, and was thereby made sole owner of said vessel, at Sitka, aforesaid; and that said sale was made with the knowledge and approval of Maksatoff, the Governor of Russian America, and in accordance with the laws of Russia; and said vessel was duly registered in the archives of the Russian government at Sitka, aforesaid, and thenceforward passed under and lawfully sailed under the Russian flag, until about October 28, 1867.

III. Admits that Kohl appeared before Dodge and procured an American register for said vessel, as alleged in the libel; but denies that the matters there affirmed as fact and truth by said Kohl, before said Dodge, were false within the knowledge of said Kohl, as alleged in the libel; and alleges that claimant is the sole owner of the vessel, as said Kohl did affirm, and is now such owner; and that said Kohl was then and had been since June, 1867, acting as agent for claimant of said vessel, under a written power of attorney from claimant, which power said Kohl still holds.

IV. Denies that Kohl obtained said register fraudulently or unlawfully, or that the same had been wrongfully or improperly obtained and used by said vessel, ever since or at

The Fideliter.

all. Denies that by reason of the premises that the vessel has become liable to be seized and forfeited.

On May 5, 1868, a general replication to the answer was filed by the libellant, and on May 8, thereafter, on motion of libellant, the cause was continued until the November term, to obtain the testimony of certain witnesses, alleged then to be in British Columbia and Sitka. At such November term, the testimony of said witnesses not having been obtained, on motion of the district attorney, the cause was continued to the March term, 1869. At the last mentioned term the libellant again moved for a continuance, to obtain the testimony of the claimant, Lugebil, and one John Duttell, alleged in the answer to have been the owner of the Fideliter, which was refused by the Court, for want of diligence in suing out the commission and letters rogatory, to obtain such testimony, and because there was a stipulation between the parties that the cause should be tried at this term.

On March 5th and 6th the Court heard the allegations and evidence of the parties; and on June 18th the cause was argued by counsel and submitted.

The following is a summary of the evidence introduced by the libellant:

1. A duly certified copy of an American Register, issued to the Fideliter, by William S. Dodge, special agent and collector at the port of Sitka, October 28, 1867, which among other things, recites and declares:—

That in pursuance of the acts of December 31, 1792, and May 6, 1864, concerning the registering and tonnage of ships and vessels, and by virtue of special instructions from the secretary of the treasury in pursuance of Art. III of the Treaty of Purchase, between the United States and Russia; and “William Kohl, of New Archangel, Sitka, agent for Joseph Lugebil, Russian resident of Sitka, by power of attorney having taken or subscribed the *proofs* required by said acts, and having *affirmed* that said Joseph Lugebil is the only owner of the ship or steam vessel called the Fideliter, of Sitka, whereof Melville C. Erskine is mas-

The Fideliter.

ter;" and "that the nationality of said vessel being duly verified and authenticated by the passport of his Imperial Majesty, the Emperor of all the Russias, under the hand and official seal of Prince de Maksatoff, His Majesty's Governor of the Russian colonies in America, which having been surrendered to this office, the said steamer has been duly registered at the port of Sitka, Alaska."

2. A certified copy of the affirmation of "William Kohl as agent of Joseph Lugebil"—being the affirmation mentioned in the certificate of registry aforesaid—dated October 28, 1867, and made before William S. Dodge, special agent and collector," in which said Kohl recites, that he is of New Archangel, and agent for Joseph Lugebil of the same place, and affirms, among other things:

"That said Joseph Lugebil is a *bona fide* Russian resident of Sitka, and has been such resident for ten years; that his present usual place of abode or residence is Sitka; that he is the true and only owner of the said ship or vessel" (the Fideliter).

3. The deposition of P. O. Dwyer, taken September 23, 1868, before the clerk of this Court, in which said Dwyer deposes:

That he had been a resident of Victoria since 1860, and that sometime between that date and 1866, the Fideliter was wrecked near Victoria, and sold at auction, and that it was the common understanding, then and there, that Mr. Kohl was the purchaser. That he was well acquainted with the principal business men of Victoria, but had never seen or heard of such a man there, as John Dutnell. That he went from Victoria to Sitka on the Fideliter with Kohl, and arrived there June 6, 1867, and that during such voyage Kohl told witness that he was taking the Fideliter to Sitka to make an American vessel of her, and that he wanted to get there by the time the country was turned over and the American flag hoisted, in order that the Fideliter might become an American vessel. That upon their arrival at Sitka and afterwards, Kohl was expecting the U. S. government agent to arrive every day and take possession of the coun-

The Fideliter.

try, but no one came, and there being no communication with the country at that time, and Kohl being tired of waiting, left on the evening of July 4, for Victoria. That sometime before Kohl left for Victoria, he informed witness that he had in some way transferred the Fideliter to Joseph Lugebil, a Russian citizen and resident of Sitka, but whether there was a *bona fide* sale of the vessel, witness could not say, and that immediately before leaving for Victoria, as aforesaid, that Kohl informed witness that he was not quite sure of Lugebil's honesty, and in order that Lugebil might not act the rogue in the matter, he then gave witness a paper, telling him, that if during his, Kohl's absence, Lugebil should attempt to sell the vessel, that he, the witness, should step forward with this paper to show that Lugebil had "no call or authority to sell the steamer." This paper the witness kept in his trunk, at Sitka, in an envelope with other papers, belonging to Erskine, the master of the Fideliter, and other persons, until the latter part of November, 1867, when it was abstracted from his trunk by Kohl or the son of witness—a lad then about twelve years of age—under the direction of Kohl, at which time Kohl and said son of witness left Sitka for Victoria, on the steamer Stephens, the vessel which had brought up General Rousseau, the government agent, to receive the country from the Russians. That said paper was not examined by witness, so as to enable him to know its contents, and that the other papers which were in the same envelope were not disturbed when this was abstracted.

4. W. W. Barlow, a witness called on the trial testified:

That he was a passenger to Sitka in the Fideliter in the spring of 1867, and that during the voyage he heard Kohl remark that he intended to transfer the Fideliter to some person in Sitka for the purpose of making her an American vessel; and that this impression as to the object of the voyage to Sitka was derived as well from the conversations with the passengers as with Kohl. That the Fideliter remained at Sitka about four weeks when she returned to Victoria and thence to Portland, with a cargo of wool from Victoria and

The Fideliter.

some cargo from Sitka, and with witness and Kohl on board. That during the stay at Sitka witness remained on shore, and the Fideliter lay a few rods out from the wharf, and that witness saw Lugebil on board the Fideliter two or three times, but cannot state what, if any, business he had there. That Lugebil came on board on the first day of Fideliter's arrival at Sitka, and that he was a Russian citizen and a leading man at Sitka, but whether or not he was a man of means, witness could not say.

5. William H. Grey, a witness called on the trial, testified:

That witness visited Sitka in steamer Wright in July, 1868. That while there the Fideliter was at Kodiak under charge of Erskine, master, and that during same time witness saw and conversed with Lugebil on the wharf and in the custom house. That in the course of these conversations witness learned from Lugebil that he was interpreter for the Russian Fur Company, and was then engaged in closing up its business, and that in reply to a direct question from witness, Lugebil told witness that "he—Lugebil—had never owned any interest in vessels."

The following is a summary of the evidence introduced by the claimant:

1. A letter of instructions addressed to Kohl, dated—"Office of the American Russian Fur Co., San Francisco, May 17, 1867," and signed "John F. Miller, President," and attested by "Henry Baker, Secretary," in which Kohl is advised: That he has been appointed general agent by the American Russian Fur Company, in Russian America, with full power to act for them in all matters which may arise in that country and to make locations, appoint sub-agents and such other employees as he might deem necessary. That purchases (if it deemed advisable to make any) should be made subject to the approval of the company; and that "you (Kohl) are authorized to draw on us (the company), not exceeding \$2,000." The letter concludes—"Wishing you a pleasant and successful trip, I remain, yours respectfully."

2. A certified copy of records and entries in the Custom

The *Fideliter*.

House at Victoria, Vancouver's Island, relating to the British built steamer—the *Fideliter*—the substance of which is as follows:

a. June 4, 1866. Certificate of registry granted to *Fideliter* by Collector of Port of Victoria, Vancouver's Island, which recites that Melville C. Erskine, of Victoria, V. I., is the master of said vessel, and that she was built at Liverpool, England, in 1859, and that John Dutnell is her owner. Record of certificate endorsed—"Vessel sold to foreigner under certificate of sale, dated May 29, 1867, at Sitka." Also—"Certificate delivered up and canceled July 10, 1867. Registry closed."

b. October 13, 1866. A bill of sale from Godfrey Brown to John Dutnell, of Victoria. Consideration \$35,000 paid down. Endorsed—"Entered of record Oct. 18, 1866."

c. October 19, 1866. Mortgage from Kohl and Dutnell to Joseph Lovett—given to secure the payment of \$16,500, due on same date from Kohl to Lovett, with interest at $1\frac{1}{2}$ per centum per month, by Kohl without qualification and by Dutnell ("as registered owner") "according to our and each of our respective interests" of the 64 shares, "of which we or one of us, are, or is owner or owners in the ship" *Fideliter*; with a covenant by Kohl and Dutnell and each of them, "that *we* have power to mortgage" said shares.

d. November 6, 1866. An assignment of the last mentioned mortgage by Lovett to the Bank of British Columbia to secure the payment of four notes of \$1,000 each, made by said Lovett and Kohl and one Thomas Wright, to said bank. Endorsement on assignment—"Entered of record Nov. 7, 1866"—on mortgage and assignment—"Release and discharge to Lovett by Bank of British Columbia, May 7, 1867."

e. May 29, 1867. Mortgage from Dutnell to Kohl to secure the payment of \$28,000, due July 1, 1867, with interest at $1\frac{1}{2}$ per centum per month. Mortgage recites that Dutnell is owner of vessel and Dutnell covenants therein that he has power to mortgage vessel and that it is free from incumbrances. Recorded same day.

The Fideliter.

f. May 29, 1867. Power of Attorney from John Dutnell to William Kohl, *irrevocable*, to sell vessel in the name of Dutnell or Kohl, and to execute the necessary writings therefor; with declarations by Dutnell—that vessel not to be sold for less than \$28,000; that vessel might be sold at Sitka or elsewhere; and that power not to be exercised after eighteen months. Recorded same day. Acknowledged before McCrea “in the absence of the Collector.” At the head of this paper it is entitled—“Certificate of sale.”

3. Originals of bill of sale from Brown to Dutnell, and power of attorney from Dutnell to Kohl, copies of which, above lettered *a* and *f*.

4. A certified copy of bill of sale of the Fideliter, dated June 6, 1867, from “William Kohl, of Victoria, in the colony of Vancouver’s Island (British Columbia),” as “agent for steamer Fideliter, belonging to John Dutnell, of Victoria,” to “Joseph Lugebil, Russian citizen, resident in the Russian colonies of America.” Consideration, \$30,000 paid down; with a covenant that Kohl had power “to transfer” vessel, and that same is free from incumbrances. (Signed) Wm. Kohl, “agent for John Dutnell.” Witnessed by M. C. Erskine.

5. A power of attorney *irrevocable*, dated June 6, 1867, from Joseph Lugebil, “Russian resident at the port of New Archangel, Sitka,” to William Kohl, “of New Archangel, Sitka,” to sell the steamer Fideliter in the name and behalf of said Kohl or Lugebil, and to execute the necessary writings therefor;—with declarations by Lugebil—that vessel not to be sold for less than \$28,000; that it may be sold at Sitka or elsewhere; and that power not to be exercised after eighteen months. Power recites that Lugebil, “being the owner of the steamer Fideliter—as specified in the bill of sale of June 6, 1867,”—the paper last above mentioned.

6. Russian passport to Fideliter, dated June 7, 1867, which recited that Fideliter “is under the command of Capt. Erskine, and owned by the Russian subject and honorable citizen, J. Lugebil.” (Signed) P. Maksatoff.

7. William Kohl, a witness called on the trial, testified:

The Fideliter.

That Godfrey Brown resided at Victoria in 1866, and was connected with the firm of Janion, Green & Rhodes, and that on March 1, 1866, witness first knew of Brown's having Fideliter in his possession. That in December, 1866, witness commenced negotiations with one Capt. Bock to take Fideliter to Sitka. Bock bought the vessel for Lugebil, and provided she arrived at Sitka in time and suited him, Lugebil was to pay witness for her. That this negotiation or agreement with Bock was reduced to writing, but witness does not know what he done with it or where it is—he may have destroyed it. At time of this agreement Bock was master of the steamer Alexander, but when witness last saw him—July, 1868—was master of a bark at Sitka. Under this agreement with Bock, Fideliter was to be taken to Sitka in May, 1867, to be used as a fur trader in some country in Russian America, that had been leased to the Hudson Bay Company. The Russian American Fur Company had been organized in San Francisco to take fur there. The company included among others named, and not named by the witness, Miller, the collector of the port of San Francisco, and Lugebil and witness. That witness presumed it was the intention of the Russian American Fur Company to use the Fideliter for the purposes of the company, but he never made any arrangement with Lugebil himself. That the vessel was to be used in the waters of Russian America, and therefore had to be a Russian vessel and owned by a Russian citizen. Lugebil being a Russian citizen, purchased the vessel—confirmed the contract of Bock when witness got to Sitka. That the Russian America Fur Company had had an agent at St. Petersburg for two years to get a lease of the grounds or country that had been leased to the Hudson Bay Company, and expected to get such lease on May 1, 1867, and “I (witness) went up to Sitka to carry out our part of the contract.” Prince de Maksatoff would not give Fideliter clearance, but said to witness that he expected the lease from the Russian government soon, and in the meantime for witness to go on and trade, but “I thought I would wait until I heard from our folk at San Francisco.” That

The Fideliter.

witness got to Sitka with Fideliter about last of May or first of June—two days before bill of sale to Lugebil.—Did not then hear anything about ratification of treaty of purchase. Saw Lugebil the first day of arrival at Sitka, he came on board Fideliter for despatches for the prince. Sold vessel to Lugebil then, and made bill of sale to Lugebil in office of Russian Fur Company. On June 6, 1867, witness went aboard and gave Lugebil possession, but Erskine continued in command. That witness remained at Alaska until evening of July fourth, when he went to Victoria, and returned to Alaska on the steamer John L. Stephens, two or three weeks before General Rousseau arrived there, which was in October, 1867. That witness took the power of attorney from Lugebil because he did not pay witness his money—did not pay all of it. That witness next saw Lugebil at Sitka on October 3 or 4, 1867. Lugebil was then an inhabitant of that country, and had been, to the knowledge of witness, since June 6, 1867, and was financier and translator for the Russian Fur Company. That witness last saw Lugebil a week or ten days ago (about February 25 or 26, 1869), in San Francisco, at Hubbard's office.

That Fideliter was once wrecked on the coast of Victoria and never ran afterwards until witness became her agent. That witness advanced money to Dutnell twice on the vessel—the first time to the amount of \$12,000: and that first and last he advanced the vessel near \$28,000. That when money so advanced the second time, then witness went into possession of vessel, and that after he took mortgage from Dutnell, witness had exclusive control of vessel. That witness first became acquainted with Dutnell in 1858; but that witness was never an intimate or associate of Dutnell's or a friend, and last saw him on December 22d or 23d, 1868.

That witness heard Dwyer's deposition read in Court, and that he did not to his recollection say to Dwyer what he testifies witness did. That witness might have made Dwyer evasive answers, as we were then in competition with H. B. Co., and wanted to keep knowledge from them. That witness did not leave paper with Dwyer nor take any paper out of his trunk.

The Fideliter.

That in speaking of the alleged sale of the Fideliter to Lugebil, to A. C. Gibbs, then acting United States district attorney, at his office in Portland, and just after the seizure of the vessel, witness did not say, and he had no recollection of saying—"It was a *bona fide* sale and the money paid, but of course I don't say where the money came from." That on same occasion, witness did not say to A. C. Gibbs—"That as soon as R. A. F. Co. organized, so as to hold vessel and receive title to her, she was to be turned over to it."

For the purpose of impeaching the testimony of William Kohl, the libellant called A. C. Gibbs as a witness, who testified:

That at the time the seizure of the Fideliter was made, he was acting as United States district attorney, and that soon after such seizure he had a conversation with Kohl concerning this matter at his (witness') office, and that he wrote to the collector of customs at Astoria, at once, telling him some things that Kohl said in this conversation, and his own conclusion as to the law of the case. (Here witness was shown a letter of six pages, dated Portland, December 28, 1867, addressed to Hon. A. Hinman, collector, etc., and signed A. C. Gibbs.)

That the letter now shown witness was written by himself to the collector at Astoria, and is the one referred to by him. After reading the letter, witness testified that in the course of the conversation referred to, Kohl said to witness, in speaking of the alleged transfer of the Fideliter to Lugebil—"It was *bona fide* and the money paid, but of course I don't say where the money came from." These are the very words of Kohl, as spoken by him in that conversation, and put in writing in the letter aforesaid, in quotation marks, and that witness is now satisfied that Kohl used these words on that occasion. That on same occasion Kohl said in substance to witness—"That as soon as Russian American Fur Company organized, so as to hold said vessel and receive title to her, she was to be turned over to it," and that witness remembered this declaration of Kohl's, without the aid of the letter to the collector at Astoria.

The Fideliter.

From the foregoing evidence, I find the following conclusions of fact:

I. That the Fideliter was a British vessel, built at Liverpool, in England, in 1859, and that prior to June 4, 1866, she was wrecked near Victoria, and while in that condition, was sold by Godfrey Brown, at auction or otherwise, on account of owners, underwriters or other persons whom it concerned, and that Kohl became and was the purchaser at such sale.

II. That Kohl being an American citizen could not obtain the registry of the Fideliter, in his own name, in the custom house at Victoria, and therefore, on June 4, 1866, he fraudulently procured said vessel to be registered at said custom house, in the name of John Dutnell, a British subject, as owner thereof; and that in pursuance of this registry, and for the reason aforesaid, said Kohl, on October 13, 1866, procured the bill of sale of said vessel to be made by said Brown to said Dutnell, which bill of sale was false and fraudulent, and without any consideration whatever, moving from said Dutnell.

III. That the mortgage and power of attorney from Dutnell to Kohl, above mentioned and described, and dated May 29, 1867, were both made without any consideration whatever, and with a view of enabling said Kohl to make an apparent bill of sale of said vessel to said Lugebil or other Russian subject, at Sitka, for the purpose of having her thereby become an American vessel, under and by operation of article 3 of the treaty of purchase aforesaid, then already ratified by United States Senate, and awaiting exchange of such ratification with the government of Russia, and contrary to the true intent and meaning of said treaty, and in fraud thereof.

IV. That the bill of sale from Kohl, agent of Dutnell, to Lugebil, and the power of attorney from the latter to Kohl, above mentioned and described, and dated June 6, 1867, were both made without any consideration whatever, and were fraudulently made and accepted by said Kohl and Lugebil respectively, for the purpose of assisting said Kohl

The Fideliter.

in making an American vessel of said Fideliter, in fraud of said treaty as aforesaid; and that it is not true that said Lugebil was, on October 28, 1867, or other day, the *bona fide* owner of said vessel, or of any interest therein, or that said Kohl, as agent or otherwise, ever in good faith sold said vessel or any interest therein to said Lugebil, and that the pretended sale of said vessel to said Lugebil, at Sitka as aforesaid, was in truth and in fact a mere sham and fraudulent device for the fraudulent purpose aforesaid.

V. That the matter of fact stated in the affirmation of said Kohl, made before the said William S. Dodge on October 28, 1867, as aforesaid, to wit: that said Lugebil "is the true and only owner" of the Fideliter, was then and there untrue within the knowledge of said Kohl; and that said matter of fact was falsely affirmed by said Kohl for the purpose of obtaining the American registry aforesaid of said vessel, he, the said Kohl, then and there well knowing that said vessel was in fact a foreign vessel, and not entitled to obtain or use said certificate of registry.

VI. That the American certificate of registry, issued to the Fideliter, at Sitka, as aforesaid, was obtained by said Kohl by fraud as aforesaid, he, the said Kohl, then and there well knowing that said vessel was not entitled to the benefit thereof; and that said certificate was thenceforth and until the seizure of the Fideliter as aforesaid, fraudulently used for said vessel, they, the said Kohl and Lugebil and each of them, then and there well knowing that said vessel was not entitled to the benefit thereof.

Upon these conclusions of fact there must be a decree condemning the Fideliter as forfeited to the United States, for the violation of section 4 of the act of December 31, 1792 (1 Stat. 289), concerning the registering of vessels; and section 24 of the act of July 18, 1866 (14 Stat. 184), to prevent smuggling, and for other purposes.

The first mentioned of these sections prescribes the oath or affirmation "to be taken and subscribed by the *owner or one of the owners*" of a vessel, in order to obtain the registry thereof, in which such owner is required to declare "his or

The Fideliter.

her name and place of abode, and if he or she be the sole owner of such ship or vessel, that such is the case; or if there be another owner or other owners, that there is or are such other owner or owners, specifying his, her or their name-or names and place or places of abode, and that he, she or they, as the case may be, so swearing or affirming, is or are citizens of the United States."

This section also provides: "And in case any of the matters of fact in the said oath or affirmation alleged, which shall be within the knowledge of the party, so swearing or affirming, *shall not be true*, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which the same shall have been made."

Section 24 of the act of 1866, above mentioned, provides: "That if any certificate of registry, enrollment or license, or other record or document granted in lieu thereof, to any vessel, shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel and furniture, shall be liable to forfeiture."

Having thus fully stated the pleadings and evidence in the case, I do not deem it necessary to make an extended argument in support of the conclusions of facts already deduced therefrom.

All the circumstances of the case point to one conclusion—that is, that from the sale of the Fideliter by Brown, Kohl has been and still is the sole owner of this vessel. During all this period wherever she may be, or whoever else pretends to own her, she is nevertheless in the actual custody and under the absolute control of this ever present and "irrevocable" agent—William Kohl and his captain—Melville C. Erskine. The alleged sales from Brown to Dutnell, and from the latter to Lugebil, have no visible effect upon the use or possession of the vessel or upon the relation of any of these parties to her. Dutnell, whoever he may be, is never seen or heard of, as exercising any acts of authority or ownership in the premises, except the equivocal and suspicious ones of signing the mortgage to Lovett in 1866, and

The Fidelity.

the mortgage and power to Kohl in 1867. True, the British registry of June, 1866, asserts that Dutnell is owner, but the record is suspiciously silent as to who procured this registry, or upon whose representations it was granted. I have no doubt that Kohl procured the registry in the name of Dutnell, because being an American citizen, he could not obtain the registry in his own name.

The mortgage to Lovett was undoubtedly given to secure the payment of an actual debt then due from Kohl to Lovett. In this mortgage, Kohl asserts that he or Dutnell, or both of them, are owners of the vessel—the latter being the registered owner—that is, named as the owner in the registry, but not so in fact.

Now, if the vessel really belonged to Dutnell, no reason is shown or suggested for his mortgaging it to secure the payment of a debt of \$16,500, due from Kohl to Lovett; nor can any reason, consistent with Dutnell's alleged ownership, be even surmised for *Kohl's* joining *Dutnell* in a mortgage of the latter's vessel for any purpose. As Kohl testifies, he and Dutnell were neither friends or associates, and at this time Dutnell does not appear, from the custom house records, to have had or claimed any authority over or interest in the vessel whatever.

The most plausible explanation of this matter is, that Kohl was all the while the real owner of the vessel, and that Dutnell's pretended ownership was a mere sham and blind for the purpose of obtaining a British register, at Victoria, and that as Dwyer testifies Kohl's ownership of the vessel was understood in that community. Accordingly Lovett took his mortgage from the real owner—Kohl, and the pretended owner, named in the registry—Dutnell. Again, it is unreasonable to suppose that Dutnell could have been the real owner of a piece of property of as much comparative importance and value, in Victoria, as the steamship Fidelity, and not be known or heard of there, by persons of ordinary opportunities for observation and acquaintance. Upon this point there is the direct testimony of Dwyer, that he had lived in Victoria since 1860, and was well acquainted

with the business men of the place, but had never seen or heard of such a man there as John Dutnell. Then there is the fact, substantially admitted by Kohl in his testimony, that Dutnell never exercised any actual control over the vessel, but that from and after the sale by Brown, he, Kohl, was her agent and controlled her movements and employment.

Consider also, that if it were a fact that Brown sold this vessel to Dutnell, at Victoria, and that the transactions concerning her, which took place between the latter and Kohl, were had in good faith and upon sufficient considerations, why has not the claimant produced the testimony of Brown and Dutnell upon these points. Its non-production by the claimant leads to the conclusion—in the absence of any excuse therefor—that if produced, it would but confirm the suspicions which the uncommon circumstances of the case necessarily excite. But it also appears from the papers in the case, that the government has procured letters rogatory to be issued, addressed to the proper Court at Victoria, to obtain the testimony of Dutnell, and that when Dutnell was found and brought before the officer appointed to take his deposition, that an attorney representing Kohl appeared and obtained a postponement of the proceeding until the next day, at which time Dutnell promised to appear and give his testimony, but that upon the next day Dutnell was missing and kept himself concealed out of the reach of process, so that his testimony was not obtained. These facts appear in the papers upon which the libellant moved for a continuance at the last March term, namely, the affidavit of the collector, the letters of the American consul and the barrister at Victoria, employed by libellant in the matter of obtaining Dutnell's testimony. They leave no room for doubt, and I am confident of the fact that Kohl procured or hired Dutnell to keep concealed, out of the reach of process, so as to prevent his testimony being taken and read on the trial of this suit; and from these circumstances, the conclusion is irresistible that Kohl prevented the testimony of Dutnell from being taken, because he knew that it

The Fideliter.

would not tend to prove the reality or good faith of the alleged ownership of the Fideliter by Dutnell, or his mortgage of the same to Kohl, but the contrary.

Kohl's testimony, in this case, is marked by studied attempts at evasion, and by notable omissions and indefiniteness in regard to circumstances, concerning which he ought to be able, and it is his duty, to speak with certainty and particularity. For instance, supposing that it was true, that he had loaned money to Dutnell at various times, for which he afterwards took a mortgage on the Fideliter, how easy and natural it would have been for him to have given an intelligent and detailed account of the matter—to have given the circumstances of time, place and particular amounts. If a person of Kohl's apparent sagacity and intelligence had have loaned a mere stranger—as he says Dutnell was—\$28,000 in small sums and at various times in 1866-7, he would most probably be able now to refer to some contemporary writing or witness to refresh his memory of the matter or confirm the fact. But after being examined and cross-examined, he is only able or willing to say in a vague, indefinite way, that he *once* loaned Dutnell \$12,000, and first and last, that he loaned him about \$28,000, for which he afterwards took a mortgage on the Fideliter, but not until May 29, 1867, when he was on the eve of taking the vessel to Alaska to convert her, through the device of a sham Russian ownership, into an American bottom.

But suppose that Dutnell was the real owner of the vessel prior to June, 1867, this does not affect the conclusion that the alleged sale to Lugebil was a mere sham and pretence. This jugglery about the title and ownership of the vessel while she was registered in Dutnell's name, is shown by the testimony of the claimant, and commented upon now, not for the purpose of showing a forfeiture then and there to the United States, but to show the animus and crooked conduct of the principal actor and witness in this matter on behalf of the claimant, from the beginning, so as to judge more intelligently of the integrity of his conduct generally, and the credibility of his testimony in this case in par-

The Fideliter.

ticular. If Kohl, by means of sham sales and false writings, had successfully imposed upon the custom house officers at Victoria, and thereby obtained a British register for the Fideliter, when she was not entitled to it, there is good reason to infer that he was ready and willing, when opportunity offered, to practice a similar fraud upon the American government, for the purpose of obtaining an American register.

The treaty of purchase with Russia and the delay between the ratification and exchange of it, furnished the opportunity. The third article of this treaty provides:

“The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion.”

This provision might be understood by the public as giving the Russian inhabitants of Alaska, an *immediate* right to have an American register for his vessel, upon the ground that the treaty had made him an American citizen; and so it appears that the department of State construed it, and instructed the collector of customs to administer it. The treaty was concluded on March 30, 1867; and it was ratified on May 28 and exchanged on June 20, thereafter. As a matter of public notoriety it is safe to say, that it was well understood or confidently expected on the Pacific coast that the treaty would be ratified at least one month before it was. The telegraph gave us instant and constant information of the progress of the treaty in the Senate, and its ratification was probably known here within twenty-four hours from the time it took place.

Under these circumstances, Kohl being an American citizen, and either the legal owner of the Fideliter or the mortgagee of the same, for quite if not her full value, and

The Fideliter.

she being a British vessel sailing under a British register, and the commerce of the coast being mainly carried on from and between American ports, it is not unreasonable to suppose that he would desire to convert her into an American bottom.

That Kohl did take the Fideliter to Alaska for the purpose of availing himself of this opportunity to convert her into an American vessel, and not for the simple purpose of disposing of her in good faith to Lugebil, or other Russian inhabitant of the country, is shown by his own admissions or statements, as testified to by both Dwyer and Barlow. In addition to this, the circumstances attending and surrounding the alleged sale to Lugebil, are sufficient of themselves to raise a presumption that the transaction was a mere sham, and really designed to facilitate the accomplishment of some ulterior purpose. For instance: Kohl arrives with the Fideliter in a strange port, without commerce, and immediately sells the vessel to a Russian subject and a stranger, without any apparent means or property, for \$30,000, and at the same moment takes from the purchaser, Lugebil, an "irrevocable" power of attorney, authorizing him to sell the vessel at Sitka, or elsewhere, in behalf of Kohl or Lugebil, for not less than \$28,000. No visible change is made in the actual possession of the vessel. Kohl's convenient captain—Melville Erskine, still retains command. After lying idle in port three or four weeks, and the United States agents not arriving to receive the possession of the country, including the Fideliter in her new *role* of a Russian ship, as Kohl had expected, Kohl returns with the Fideliter to this port *via* Victoria. All this time, and for that matter ever since, "the Russian subject and honorable (?) citizen; J. Lugebil," as Prince de Maksatoff graciously styles him in his passport to the Fideliter, is apparently as unconcerned about the vessel as if he had never seen or heard of her. When she is seized on account of the sequel of this transaction, he does not even appear in this Court to claim her as his property. True, this "irrevocable" agent makes such claim for him. But if

The Fideliter.

Lugebil really owned this vessel, it is but reasonable to assume that self interest, at least, would have induced him to come before this Court and testified as to the facts and circumstances which would establish such ownership; but, instead of doing this, he manages to keep out of sight and knowledge of the district attorney and collector, so that the government, although it has sent its commissions to Alaska and San Francisco, has been unable to find him or obtain his testimony.

One phase of Kohl's story is, that he negotiated this sale to Lugebil at Victoria, in December, 1866, with Captain Bock, of the steamer Alexander, and that the agreement between them was then reduced to writing, but what he did with this writing, or where it is, he cannot now say—indeed, he is not certain but that he destroyed it. Now, this negotiation is a material circumstance for the claimant, as tending to show that the alleged sale to Lugebil, in June, 1867, was not a fraudulent device, whereby to make the Fideliter an American bottom, because it took place before the treaty was negotiated, and so far as known, before it was contemplated. If this story be true, why is not the testimony of Captain Bock produced to confirm it? Kohl testifies that he saw him at Sitka in 1868, since this suit was commenced. Besides, he might be able to give valuable information concerning the whereabouts and character of the writing said to have been entered into between himself and Kohl, in December, 1866, and about which Kohl's memory is now so singularly and conveniently at fault.

The legal and reasonable inference from this suppression of evidence or withholding Lugebil's testimony is, that while Lugebil consented to be known on paper as the purchaser and owner of the Fideliter, so as to assist Kohl in fraudulently obtaining an American register for a British vessel, yet, that he was not willing to go so far as to commit the crime of perjury in support of such scheme.

Again, if Lugebil was the "true and only owner" of the Fideliter, *he and not* Kohl should have taken and subscribed

The Fideliter.

the owner's oath, upon which the American certificate of registry was issued to her at Alaska, on October 28, 1867. For obvious reasons, the act of 1792 requires this oath to be taken by the owner. No excuse, however insufficient in law, is shown or pretended for his not taking it. He was in the port when and where the certificate was granted, and probably in the very building where the transaction took place. But Kohl took and subscribed this oath, affirming therein that Lugebil was the "true and only owner"—and the only reason why Lugebil did not take it, was, that he was not willing to serve Kohl so far as to commit perjury for him.

And here I may remark, that the collector before whom this proceeding took place has attempted, since this suit was commenced, to excuse and palliate his very singular and suspicious conduct in granting this certificate of registry to the Fideliter, upon the oath of a person who therein affirmed that at the time *another* was "the true and only owner" of the vessel, when the statute under which he was acting, required that said oath should be taken by the owner. This excuse is found in a volunteer, extra-official, *ex post facto* statement endorsed by the collector upon the power of attorney from Lugebil to Kohl, and dated "Custom House, Sitka, July 23, 1868;" in which, among other things, said collector states that he "allowed William Kohl, as agent aforesaid, to make the affidavit of ownership, *the said Lugebil being at that time confined to his house*, and issued to him the register (No. 1)."

This statement, not being an official certificate or under oath, was not admitted to be read in evidence in the case, and if it had been would in no way or degree tend to prove that Kohl's oath as to the ownership of the vessel was true.

On the other hand, the very insufficiency of the reason given by the collector for Lugebil's not taking the owner's oath, raises the presumption, that the real reason if disclosed, would militate against the party withholding it. Admit, for the sake of the argument, that Lugebill was confined to his house on October 28—admit this statement to

The Fideliter.

be true in every sense, and to the greatest extent that can be attributed to it, and still nothing is shown by it or can be inferred from it, but that Lugebil, notwithstanding such confinement, could take and subscribe an oath that he was the true and only owner of the Fideliter—*if such was the fact.*

Many other circumstances point to the conclusion that the alleged sale to Lugebil was a mere make believe for the purpose of obtaining an American register for the Fideliter. When a lawful and actual transaction takes place between intelligent parties, they are generally able to tell the same story twice about a simple and important fact of the matter. But the evidence of the claimant as to the consideration alleged to have been paid by Lugebil is full of discrepancies and contradictions. In the bill of sale signed by Kohl it is declared that the sum—\$30,000, was paid down by Lugebil. After the seizure Kohl told the then acting district attorney, Ex-Governor Gibbs, that the money was all paid down, but of course he did not say where it came from—which expression, under the circumstances, was evidently intended by Kohl to be understood as a suggestion that Lugebil, in making the purchase, was acting for other parties, who furnished him the money. Upon his examination in Court as a witness, on the trial of the cause, being pressed to explain why, if he had sold the vessel to Lugebil and got the money for her, he retained the possession and took back from the purchaser an “irrevocable” power of attorney to manage and sell the vessel as though it was his own, Kohl answered that Lugebil did *not* pay him for the vessel—and then upon second thought, qualified that statement by adding that Lugebil did not pay him *all* the money for the vessel.

Upon its face, Lugebil's power of attorney, authorizing Kohl to manage and sell the vessel, not being given in connection with a mortgage or other security for debt, can only be accounted for on the theory that the vessel was still in fact the property of Kohl and was to remain in his possession unaffected by the pretended sale to Lugebil. In all probability, this power was the paper that Kohl put into the hands of Dwyer when he left Sitka with the vessel on the

The Fideliter.

evening of July 4, telling Dwyer at the same time that he was not certain of Lugebil's honesty, and this paper would show that "he had no call or authority to sell the steamer." Very naturally, having found Lugebil willing to aid him in his design to impose upon the United States government, in obtaining an American register for a British vessel under the pretense of its being a Russian-American one, Kohl was not quite certain that Lugebil would do to trust out of sight; so he took this power of attorney from him, which in effect amounted to a re-sale to himself, and left it with Dwyer, to be exhibited in case his Russian confederate should attempt "to act the rogue in the matter" during his absence.

On the whole, it seems that there cannot be a reasonable doubt, but that Kohl's affirmation was knowingly false, when it asserted that Lugebil was the true and only owner of the Fideliter; and that the register granted upon such affirmation was knowingly and fraudulently *obtained* and *used* for said vessel. (*The Neptune*, 3 Whea. 609.) This being so, the vessel is forfeited under both sections of the statute already quoted. But even a *prima facie* case is sufficient to cast the burthen of proof upon the claimant, and if he do not overcome or explain it, there must be a decree of condemnation. (*The Luminary*, 8 Whea. 411.)

On the trial, counsel for claimant maintained this proposition,—admitting that sham sales or fraudulent acts had taken place or been committed in respect to this vessel, as they took place without the jurisdiction of the United States, if at all, and within the jurisdiction of the British and Russian governments respectively, they can not be inquired into here; or in other words that this government did not assume to punish frauds upon the navigation or shipping laws of other countries.

The proposition considered with reference to the question before the Court is fallacious, and the answer to it is simple and satisfactory.

The forfeiture of the Fideliter is not claimed in this suit because of the frauds committed in respect to her upon the British and Russian navigation laws, but because of the

The Fideliter.

further and additional fraud, namely—the false affirmation of Kohl, by means of which an American registry was obtained for the Fideliter in fraud and violation of the treaty and laws of the United States. I admit that this answer assumes, that the sale by Kohl to Lugebil, being in fact a sham or fictitious sale, without possession, although made within Russian jurisdiction, conveyed no interest in the vessel to Lugebil. Certainly such a transaction cannot transfer title to property in any civilized country. It is no sale—a mere nullity. This Court, then, instead of being engaged in an attempt to punish frauds upon the laws of other countries, is simply endeavoring to ascertain whether the affirmation of Kohl, an American citizen, made on American soil and under American laws, was false or not, in the particular alleged. In so doing, it becomes necessary to inquire whether one Lugebil, a Russian subject, was on that day the true and only owner of the Fideliter, as stated in such affirmation. This is a question of fact, and the scope of the inquiry is not limited by either the political or geographical divisions of the globe, but extends to all pertinent and material acts and circumstances, without reference to the place or jurisdiction in which they transpired or arose. If the law of the place gave a certain legal effect to these facts, the same effect would be given to them here, so far at least as the comity of nations requires one country to enforce and recognize the municipal laws of another. But who will pretend that the law of Russian America or British Columbia gave any legal effect or consequence whatever, to a sham sale of a vessel without consideration or possession. Such a transaction is a mere nullity, always and everywhere. But if the laws of these countries did give any effect to such a sale, they would not in this respect be enforced or recognized in this Court, when it appears, as in this case, that it was made for the express and only purpose of enabling one of the parties thereto, to perpetrate a fraud upon the navigation laws of the United States.

These conclusions are fully sustained by the case of *Herrara et al. v. The Bark Acme*, lately decided by Mr. Justice

Benedict. The case is reported in the Internal Rev. Rec., vol. VII, No. 19. The facts are stated by the Court as follows:

“The bark *Acme* appears to have been built in Baltimore in 1855. At some time thereafter she was transferred, whether nominally or not does not appear—to one John Patterson, described as ‘of Inverness, Scotland, but now residing in the city of Brooklyn, State of New York.’ In January, 1866, she by purchase became the property of persons residing and doing business in New York, who were not British subjects, and who, in the absence of other proof must be presumed to be American citizens. These persons, in order to avoid the navigation laws, and to retain for the vessel the British flag, to which as the property of American citizens, she was no longer legally entitled, *caused the title of the vessel to be placed in the name of one Henry James Creighton*, described as ‘of Halifax, Nova Scotia, but now residing in the city of New York,’ and *who had, in fact, no interest in the vessel nor any possession thereof*; and thereafter, although in reality owned and possessed by American citizens, controlled by them alone, and used for their sole benefit, the vessel, up to her seizure by the marshal, sailed under false colors, with a fraudulent nationality. While so sailing, the present respondent (Millington) agreed with the real American owners of the vessel, to loan them the sum of \$12,000, upon the security of their personal obligation, and a mortgage on the vessel, to be executed by the fictitious owner, and accordingly, in accordance with the forms of the British laws, Creighton, *then without interest or possession in the vessel*, executed a mortgage upon her to secure the amount so loaned by Millington, which mortgage was received by Millington with the knowledge that the mortgagor did not own the vessel, but *simply held the title for the purpose of giving her a false nationality*. Under this mortgage Millington, never having taken any possession of the vessel, now claims the proceeds of her sale, as against Herrara,” who had a lien for advances made to her.

The Court rejected the claims of Millington, because the

The Fideliter.

alleged title of his mortgagor, Creighton, was a fictitious one and a sham. In the course of the opinion, Mr. Justice Benedict says:

“The transaction here disclosed, as it regards the title and character of this vessel, was a clear fraud upon the navigation laws of the nation whose flag was thus assumed. By the law of England, the use of the British flag and national character upon vessels owned by other than British subjects is unlawful, and subjects the vessel to forfeiture. Were this case, then, before the English admiralty, the claim of the mortgagee would be rejected as founded upon a sham title, created in violation of law; and the question is presented whether it is not the duty of this Court to apply the same rule.”

The opinion of the learned Judge proceeds to show, that “Courts of admiralty are in some sense international Courts, charged with the duty of declaring the law applicable to ships, and in force upon the sea.” * * * “The nature of the transaction in question, and the effect which such transactions, if upheld, must have upon the mode of use of that most peculiar species of property, the ships, seems to require, in a Court of admiralty, in a case like this, to accord effect to the laws of England, in contravention of which the title to this vessel was held.” * * *

“Furthermore, the United States have an interest in enforcing this law as well as England, for it is of importance to all maritime powers, that the national character borne by a ship should be her true character.” * * * * “I am of the opinion that it is the duty of this Court upon principles of comity in this case, to apply the rule which would be applied in the English admiralty, and refuse to recognize a claim to the fund, based upon a sham title, created in fraud of the navigation laws of England, for the purpose of giving to this ship a false nationality.”

• It was also insisted by counsel for claimant that the Russian passport granted to the Fideliter, by Maksatoff, was conclusive evidence in favor of Lugebil's ownership. This paper was admitted in evidence, not to show the ownership

The Fidelity.

of the vessel, but her nationality. In the consideration of the case, I have not regarded it as material to the inquiry before the Court, except, perhaps, to show that the official who granted it, was not very scrupulous as to what vessels he gave a Russian character, for the purpose of enabling them to acquire the American nationality under the treaty of purchase, which was about to terminate his rule and interest in the country. Under the same circumstances, Maksatoff would probably have given to Lugebil or Kohl a Russian passport for the British navy. The claim of ownership contained in this passport, is simply a *recital* by Maksatoff of what Lugebil or Kohl told him when the paper was applied for. No higher character can be claimed for this paper than that of a register. Now a register in favor of the party claiming to be owner, is no evidence of ownership at all, being nothing more than his own declaration. (1 Green. Ev. §494.)

A decree will be entered condemning the vessel as forfeited to the United States for the reasons and causes in the libel propounded and alleged, and because the vessel has been delivered to the claimant upon the bond of himself and sureties, a further decree will be entered, that the libellant recover off the parties in said bond the sum of \$30,000, that being the stipulated value of said vessel, and that if such sum is not paid to the clerk of this Court, within ten days from the date thereof, that the libellant have execution therefor.

Joseph N. Dolph, for the libellant.

Erasmus D. Shattuck, *W. W. Page* and *S. W. Brockway*, for claimant.

Matthew H. Spaulding v. William Tucker.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT
OF CALIFORNIA.

CIRCUIT COURT, OCTOBER 26, 1869.

MATTHEW H. SPAULDING v. WILLIAM TUCKER.

A mode of inserting detachable teeth in circular saw plates upon circular lines, so as to distribute the strain caused by the point of the tooth pressing upon the wood, over the whole surface of the socket or recess in which such tooth is inserted and thereby prevent the plate from cracking, is a patentable invention.

A patent is not allowed for the mere exercise of mechanical skill; the patentee must add something to what was previously known or used.

If, after a patentee has conceived the idea of his invention, and while he is in process of developing and testing it, a third person should make suggestions to him similar to the conception already in his mind and upon which he was then experimenting, such suggestion would not affect the originality of the discovery or the validity of the patent.

Credibility of witnesses a matter of fact for the jury.

Letters patent are *prima facie* proof of the priority of the patentee's invention, and that it is both novel and useful.

After a patent has become valuable and the subject of controversy, the testimony of a witness who states, that at a particular time and place long past, he suggested to the patentee the fundamental idea of his invention, should be acted upon by a jury with care.

The opinions of mechanical experts are not facts which bind the jury upon a question of identity of improvement or construction, but the jury must judge for themselves and find the facts accordingly.

Damages for infringement to be proved, not guessed at.

This action was commenced in August, 1868, to recover damages for the infringement of a patent granted to the plaintiff for the discovery or invention of an improved mode of inserting detachable teeth in circular saw plates.

In the course of the trial, many of the important questions made by the defendant, were disposed of by the Court on objections to the evidence offered by him, to prove that the invention of the plaintiff was not novel or patentable. At the close of the testimony, which occupied some days, counsel agreed to submit the case to the jury, without argument, upon the charge of the Court, as to the questions before them.

Matthew H. Spaulding v. William Tucker.

DEADY, J.—*Gentlemen of the jury*: I regret that counsel have concluded not to argue this case to you, as the Court would thereby have more time and opportunity to consider what instructions it ought to give you concerning the questions of law and fact which arise in it.

You have been chosen to try the issue between the parties. You are to decide all questions of fact submitted to you, according to the evidence given you in Court. The law of the case will be given you by the Court, and you are bound by your obligations as jurors, to be governed by it, to take the law as the Court gives it to you, and apply it to the facts of the case as you ascertain them to be, and find your verdict accordingly.

But, before proceeding further, I give you the following special instructions at the request of the plaintiff and defendant respectively. At the request of the plaintiff, I instruct you that—

“This is an action brought for an alleged infringement of certain letters patent, granted by the United States to the plaintiff, Matthew H. Spaulding, for an alleged new and useful improvement on saws and saw teeth. Said alleged improvement consists:

“I. In forming a recess or socket in the periphery or edge of the saw plates, for the insertion of detached or movable teeth on circular lines, where the pressure or strain is applied; and

“II. Making in combination with such sockets or recesses formed in saws or saw plates, teeth having their base or bottom plates formed on circular lines, to fit with exactness and precision in said sockets or recesses.

“The object of the alleged invention, ‘is the construction of saws in which detachable or removable teeth may be used without danger of cracking or shifting of the saw plates, on account of such teeth being inserted therein.’”

“If the jury believe from the evidence, that the plaintiff Spaulding, did make the change alleged by him in the form of the sockets or recess made in the edges of saw plates for the insertion of removable teeth, and further believe that

Matthew H. Spaulding v. William Tucker.

such change produced a new and beneficial effect in rendering the saw plate less liable to split or crack, and also believe that said Spaulding was the original and first discoverer or inventor of such change in the form of said sockets or recesses, then his patent is valid, and vests in him the exclusive right and liberty of making, using, and selling to others to use, such invention.

"If, in the course of his conversation at the shop, Sonberger suggested the rounding of the corners, and yet the plaintiff had conceived the idea before, and was experimenting upon it, in the progress of developing and testing it, and proceeded to do so, and obtained a patent for it, the suggestion of Sonberger under those circumstances, would not invalidate his discovery or his patent.

"The plaintiff in his pleadings has only claimed five thousand dollars damages, and the verdict must not be for more than that amount."

Of the special instructions requested by the defendant I give you the following two:

"A patent is not allowed for the mere exercise of mechanical skill; the patentee must, to entitle himself to his patent, have first invented the subject matter of his patent; must have added something to what was previously known or used.

"The credibility of the witnesses of the plaintiff and defendant are altogether matter of fact for the jury, and in determining the amount of credit due them respectively, the interests, relations, motives and opportunities of observation of each witness, will be taken into consideration. But if the jury believe, that any party or witness has willfully sworn falsely with respect to any material fact, they are at liberty to disregard the whole of the testimony of such party or witness."

As you perceive, the plaintiff claims to be the inventor of a new and useful mode of inserting detachable teeth in circular saw plates, for which he has obtained a patent, and that the defendant now and since July, 1868, is infringing upon such patent by selling circular saws with detachable

Matthew H. Spaulding v. William Tucker.

teeth inserted therein upon the principle and according to the mode discovered by him.

The defendant denies generally that the plaintiff invented the alleged mode of inserting teeth and the validity of his patent therefor; and also pleads specially that the discovery was made by one Newton prior to the date of the patent to the plaintiff. The Court having excluded the evidence offered in support of this defence as immaterial, upon the ground that the instrument or invention described in the patent to said Newton was a species of rotatory mortising machine, and bore no similarity to the invention claimed by the plaintiff and now here in controversy, you have nothing to do with it.

The defendant also defends his conduct on the ground that in 1865 a patent was issued to one Emerson for an improvement in the mode of inserting adjustable teeth in circular saws, and that in 1866, Emerson transferred his right under such patent to the American Saw Company, and that a patent issued thereon to such Company, in whose employment and by whose authority defendant is engaged in selling saws aforesaid.

The first controverted question in the case is the priority of invention. The plaintiff's patent is *prima facie* proof that he first invented the mode of inserting detachable teeth as described therein on circular lines, to prevent the cracking of the saw plate, and that such invention is both novel and useful. In other words, in the absence of satisfactory proof to the contrary, the patent is sufficient proof of the facts necessary to enable the plaintiff to support this action, except the alleged infringement hereof by the defendant. Therefore, although the priority of invention is a question for the jury to decide, yet you are bound by the rule of law, which makes the patent *prima facie* proof of these facts, and must find accordingly.

The only evidence in the case which tends to controvert the evidence of the patent is the testimony of Sonberger. That testimony was received without objection by the plaintiff, and is to be considered by you. You remember Sonber-

Matthew H. Spaulding v. William Tucker.

ger's testimony as to the conversation which he states took place between himself and the plaintiff in the shop at Sacramento about rounding the base of the socket to prevent the cracking of the saw plate. Upon this point you also have the testimony of Ratcliff, Hansford, and the plaintiff. If you are satisfied from this evidence that Sonberger showed or told the plaintiff how to insert teeth upon circular lines, so as to prevent the saw plates from cracking by force of the strain upon the rear right angle of the rectangular socket—that he fully communicated the idea to him at the time—and that Spaulding had not already conceived the idea and was not then experimenting upon it, then I do not think Spaulding can be considered the discoverer of the method, although he afterwards put the idea into practice and obtained a patent for the invention.

Where a witness testifies that on some particular occasion long past, he communicated to the patentee the fundamental idea involved in his invention, and so far as appears nothing was ever said or heard about such communication by any one until the patent became suddenly valuable, and a controversy arose between the patentee and others concerning it, his testimony ought to be cautiously received by the jury and acted upon with hesitation.

The evidence being in conflict upon this point, you must decide it according to the preponderance thereof; but you must remember that the burden of proof is upon the defendant to overcome the *prima facie* case made by the patent—to satisfy your minds that the plaintiff was not the discoverer of this mode of inserting teeth in saw plates, as he claims to be, before he can claim a verdict at your hands. But if the evidence satisfies your minds that the plaintiff did not make this discovery, then you have come to the end of your investigation, and your verdict should be for the defendant.

On the other hand, if you should find in accordance with the patent that the plaintiff was the discoverer or inventor of his mode of inserting teeth, then you will consider further whether the plaintiff's and defendant's saws are identical in

Matthew H. Spaulding v. William Tucker.

this particular, or whether the mode of inserting the teeth in the latter includes the invention or improvement of the former.

As you perceive, the Emerson tooth is so constructed and inserted as to lie upon its back and allow the shank to run out under the cutting point of the tooth and receive the sawdust therefrom and thus prevent the wearing of the saw plate by the friction of the flying dust. Thereby, it is claimed, the tooth is worn, but the plate, which is the more valuable of the two, is saved. This is the claim of the Emerson patent. But the plaintiff does not claim anything in his patent in this respect.

The plaintiff's invention consists in inserting teeth upon circular lines, so as to distribute the strain caused by the tooth impinging upon the wood, over the whole surface of the socket, rather than let it bear upon a particular point or angle, as it did, when they were inserted in rectangular recesses.

Now, the saving of the saw plate, by constructing the tooth so as to catch the sawdust, may be a valuable improvement in the manufacture and insertion of adjustable teeth, but the patent to Emerson and the American Saw Co., therefor does not give any one a right to sell saws with these Emerson teeth inserted therein upon circular lines so as to prevent the cracking of the plate.

If, then, it appears that the defendant's saws have their teeth inserted upon circular lines, so as to prevent the plates from cracking, as they would if inserted upon straight lines, the patent of his employer does not protect him in so doing, and he is liable in damages to the plaintiff for the infringement of his patent.

Certain persons, professing to be skilled as mechanics and machinists, have testified before you as experts, upon the question of the identity of the two modes of inserting teeth in this particular. Their opinions are entitled to consideration and weight at your hands, in proportion to the intelligence and fairness with which they gave their testi-

Matthew H. Spaulding v. William Tucker.

mony. But their opinions are not facts, and you are not bound by them, but must find the fact for yourselves. Particularly is this so, when in a case like the present, the subject of the controversy is simple in principle and plain in form, and you have the machines or articles before you for inspection. The Spaulding and Emerson saw and models of the different teeth have been produced in evidence, and you have inspected them.

Under the circumstances, you can judge for yourselves whether the principle of the Spaulding patent—inserting the teeth on circular lines—has been used in the manufacture of the saws sold by the defendant.

If you find for the defendant upon this point, your verdict must be for him also. If there is no substantial identity in the mode of inserting the teeth in the two saws, then there is no infringement of the plaintiff's patent. But, if you find that the teeth in the defendant's saws, however different in other particulars from the plaintiff's, are inserted on circular lines, so as to prevent the cracking of the plates, your verdict must be for him.

If you find for the plaintiff, he is at least entitled to nominal damages—one cent. Beyond this you must find whatever damage the evidence shows the plaintiff has sustained by the wrongful conduct of the defendant. You are not to guess at the damages, but they must be established by the evidence. On the other hand, it is not necessary that there should be direct proof of every dollar of injury or loss. You are to consider the matter as reasonable and practical men, having reference to the nature and circumstances of the case.

Among other things, you may consider what the plaintiff's business was worth before the defendant commenced the sale of saws in this market—what number of teeth he was accustomed to sell yearly; whether he has sold a less number, or an equal number at a less price since the competition of the defendant commenced; and whether the reduction in profits, if any, was produced by such competition, or by

Matthew H. Spaulding v. William Tucker.

the general stagnation in business in the country, the lowering of the price of labor, increased facilities for manufacture, etc., or all combined.

The jury found a verdict for \$1,000, for which sum increased by another \$1,000, the Court, under section 14 of the act of July 4, 1836 (5 Stat. 123), gave judgment at the same term.

J. B. Felton and M. A. Wheaton, for plaintiff.

Hall McAllister and I. J. Bergin, for defendant.

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APPENDIX.

At the opening of the March term of the District Court, (March 1, 1869), the following charge was delivered by the Court to the Grand Jury:

DEADY, J. *Gentlemen of the grand jury:* You have been selected from among the body of your fellow citizens to inquire concerning the commission of crimes against the United States, within the district of Oregon. A more delicate and important trust you could not be called upon to fill. Upon the proper discharge of your duties depends the stability of government and the purity of its administration.

Your official oath is a sufficient direction as to your general duties. By this you have become bound under the most solemn obligations to present no one from hatred, envy or ill-will, and to leave no one unrepresented through fear, favor or affection.

This oath binds you to make diligent inquiry, as well as to present truly. You cannot acquit yourself of this obligation by slight or careless investigation. It is not enough that you dispose of the cases laid before you by the district attorney, or one of your own number. Your power and duty authorize and require of you to make special inquiry for yourselves as to the violations of law throughout the district. Except by the consent of twelve of your members, no person can be put upon trial in this Court on a criminal charge. You are a shield to protect the weak and innocent from false and unjust charges, and a power able to accuse the guilty, be they ever so great or popular.

In respect to the manner and extent of your inquiries, your own good sense will be your best guide. You ought

only to act upon legal evidence, or what satisfies you that the legal evidence exists. The party accused, or concerning whom an inquiry is made, has no right to be heard before you, and you should not allow him in the jury room, or to be examined as a witness in his own behalf. The district attorney will be ready to assist you in your inquiries, and give you information upon matters of law. You may also at any time come into Court, and propound such inquiries concerning the business before you as you see proper.

If you have any reason to believe that any officers of the government possess information proper for your action, you should summon them before you, and examine them thoroughly. Officers connected with the assessment and collection of internal revenue may with special propriety be thus examined.

Upon the three subjects of internal revenue, counterfeiting and the postoffice, I will give you in charge the following, from the charge delivered by Chief Justice Chase, to the United States grand jury for West Virginia, in August last:

“The first of these is the faithful execution of the internal revenue laws. The war in which the nation has been recently engaged for the preservation of the national Union and government endangered by rebellion, made the contracting of a large debt inevitable. This debt is the price of our national existence, and binds irrevocably the good faith of the people. Its inviolable obligation has been recognized by a solemn act of the nation in adopting the fourteenth amendment of the Constitution of the United States, which declares that the ‘validity of the public debt of the United States, authorized by law, including debts incurred for the payment of bounties for services in suppressing insurrection or rebellion, shall not be questioned.’ There are differences of opinion as to the mode of payment required by the contracts of the American people made through their government? but nobody questions openly, if anybody questions at all, that the debt contracted must be paid, and paid in perfect good faith. The law of the amendment that the validity of the national debt shall not be questioned was already written upon the hearts of the people before they made it part of the constitution. To

provide for the reduction and final payment of this debt, and for the annual expenses of the government, taxes are necessarily imposed. In other words, the equal proportion to be contributed by each citizen is ascertained by law. He who withholds his just proportion deprives the rest of the people of exactly the amount withheld. His fraud operates as theft.

“The sum total necessary to meet the obligations of the nation must be raised. Fraud upon the revenue does not reduce that sum: it merely shifts the burdens evaded by the fraudulent, upon others, who pay their full proportion besides. All honest men, therefore, have a common cause against the dishonest.

“You, gentlemen, represent the honest men, and it is your duty to see that no defrauder of the revenue who can be brought to justice escapes merited punishment. The higher in office and the higher in social position the delinquent may be, the more unremitting and searching should be your diligence in inquiry and presentment.

“Some of the observations just made might be properly enough repeated upon the next topic to which I must invite your attention. I refer to counterfeiting. It is to be regretted that the currency of the country now consists wholly, or almost wholly, of paper; but it is not the less important on that account that the people should be protected, as far as possible, against counterfeiting. Whatever the currency of the country may be, payments must be made in it, and exchanges effected through it. It is practically the common measure of values. Whoever imposes a counterfeit dollar on the public, robs successively all who take it in payment. Counterfeiting is continuous robbery, and it robs chiefly those who are the least able to bear the loss. Occasionally men are defrauded by counterfeit money in large transactions; but the principal sufferers are laboring men, whom it is the peculiar duty of government to protect from wrong.

“You will be vigilant, gentlemen, in your investigations concerning this class of crimes.

“What remains to be said concerns offences against the postoffice laws. Under our benignant system of government, the means of cheap and frequent intercourse between

the most distant parts of the republic are provided; relatives and friends separated by the breadth of the continent correspond freely with each other. Correspondence is nearly as cheap as talk. And not only do the mails convey messages of affection, science, and business, but they are also the agents of immense pecuniary transactions, by remittances of bills of exchange and small government money orders. You see at once how important it is that the laws which regulate this vast interchange should be faithfully executed; and we are confident that nothing more is needed to insure your best endeavors to detect and bring to justice all those whose crimes and offences deprive the people of the great benefits which those laws are intended to secure."

Before closing, I feel bound to call your attention to some supposed offences against public justice in this district, which, if true, should not go unpunished. By the second section of the act of March 2, 1831 (4 Stat. 488), it is enacted that: "If any person or persons shall *corruptly*, or by threats or force, endeavor to *influence*, intimidate, or impede any juror * * * in any Court of the United States, in the discharge of his duty, or shall *corruptly*, or by threats or force, obstruct or impede the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offence."

To endeavor to corruptly influence a juror in the discharge of his duty, is a crime which strikes at the very foundation of civil society. A verdict which is produced or prevented by any other means than the proper and natural effect of the law and evidence given in Court, is a falsehood and a wrong, the evil consequences of which are enduring and not limited to the parties immediately interested. With honest and fearless juries, protected from the corrupting influences and misleading misrepresentations of unscrupulous and interested parties, all other forms of crime against society and individuals may be successfully combated and repressed. But so soon as it is understood in the community that jurors

or juries may be tampered with by outside parties with impunity, then there is an end of an honest administration of the law, by jury trial, and the country will speedily drift into anarchy or despotism.

Any improper attempt to influence a juror is forbidden by this statute. Of course it is improper to offer a juror any valuable thing or consideration to obtain a verdict, or prevent one being found, or to influence his opinion or action in any particular. It is also improper and criminal to endeavor to influence a juror by conveying or imparting information to him out of the jury box, for the purpose of affecting his conduct or judgment, or to endeavor to persuade him by arguments or appeals of any kind, except those addressed to him by counsel in open Court.

It has been bruited abroad, that such practices have been resorted to for the purpose of influencing the action of jurors in this Court, in a criminal case of great importance, lately tried herein. It is your duty to investigate the matter thoroughly, and if you find cause, present the offending parties for trial. I also deem it proper in this connection to warn you against hasty and inconsiderate action in the premises. At the same time, I repeat, that it is your bounden duty, to probe this matter to the bottom, and present the offending parties, if any, for trial. If such evil practices are tolerated by the grand jury, unscrupulous men will engage in the manipulation of juries as a trade, and then whether a party accused of a crime is convicted or acquitted, will depend more than anything else upon the skill and influence of the "jury-broker," whom he may chance to retain to manage the case on the outside for him.

We often boast of our high civilization and not infrequently deplore the ignorance and barbarism of our ancestors. But as a means of determining the guilt or innocence of the accused, the ancient wager of battle was quite as trustworthy as such a jury trial, and much less demoralizing to the community at large.

INDEX.

ACTION.

1. An action for a penalty for the violation of the Internal Revenue Act (14 Stat. 144), is a civil action, and the jury are to find according to the preponderance of the evidence. *U. S. v. Brown*, 566.
Action Criminal, See CRIM. LAW.
Action for Divorce, See DIVORCE, MARRIED WOMEN.
Action of Ejectment, See PLEADINGS, 5, 6, 7, 8, 18, 19.
Action in Equity, See COPYRIGHT, INJUNCTION, EQUITY, COVENANT, 1, 2.
Action to avoid Fraudulent Conveyance, See CREDITORS, MARRIED WOMEN.
Actions on Official Bonds, See POSTMASTER, REVENUE, 12.
Actions for Tort, Congress may indemnify against, See CONGRESS, WASTE.

ADMIRALTY.

1. In a suit for seaman's wages the maxim that "freight is the mother of wages" does not apply to a voyage commenced and intended to be made in ballast, for in such case it was not expected that freight would or could be earned. *The Christina*, 49.
2. A contract to ship as seaman on a trading voyage on the coast, without any definite stipulation as to the time or place of termination of the voyage, when justice to the seaman requires it, will be held void. *Id.*
3. A contract entered into between master and seaman, *at sea*, changing the terms or duration of the original contract, should be closely scrutinized, and if prejudicial to the seaman's interest, disregarded. *Id.*
4. Where a jettison of cargo becomes necessary for the safety of the vessel, the owner and vessel are liable for the loss, if the peril of the ship is directly attributable to the want of diligence or skill upon the part of the master or crew. *The Jenny Jones*, 82.
5. Where a vessel came into the Columbia river without a pilot and without any imperative necessity for so doing, and owing to the want of knowledge on the part of those in charge of her, as to the usual state of the tide and wind at that season of the year and time of day inside of Cape Disappointment, such vessel was thrown upon Sulphur Spit, and was compelled to throw over part of the cargo, the owner and vessel were held liable for the loss, because the same was directly attributable to the unskillfulness and ignorance of the master, in attempting to cross the bar when and as he did. *Id.*

See COMMON CARRIER, 2, 5, 7, 8; CONTRACTS, 1, 2, 3; PILOTS, PLEADINGS, 3, 4, 14, 15, 16, 17, 28, 29; SALE OF SHIPS, SEAMAN, FORFEITURE, 1.

AFFIDAVIT.

See ARREST, 1.

AGENT.

1. Same person cannot be for master employing, and seaman hiring, at one and same time. See HABEUS CORPUS, 2.

AGREEMENT.

See CONTRACTS, *Nudum Pactum*.

ALIEN.

See JURISDICTION, 3, 4.

ANSWER.

Effect of admissions in, See EVIDENCE, 5.

APPROPRIATION OF PAYMENTS.

Rule as to, *The Pioneer*, 72.

ARREST.

1. Where the cause of action and arrest are identical, a verified complaint is a sufficient affidavit upon which to allow an order of arrest. *U. S. v. Walsh*, 281.
2. The *conditions and restrictions* imposed by State law upon the allowance of imprisonment for debt, subsequent to the act of January 14, 1841 (5 Stat. 410), are not adopted by such act; and, therefore, not in force in the United States Courts, unless adopted as a rule thereof. *Id.*
3. The clause in the Constitution of the State of Oregon (Art. 1, §19), prohibiting "imprisonment for debt, except in cases of fraud," construed not to apply to an action for a tort or penalty, but only to cases of debt arising upon contract, express or implied. *Id.*
4. A manufacturer of matches who disposes of the same without stamping them, as required by law, thereby commits a fraud upon the United States, and in an action by the latter to recover a penalty for such violation, the defendant may be arrested as in an action for a debt incurred by fraud. *Id.*

See FALSE IMPRISONMENT.

ASSAULT AND BATTERY. *

1. When one of the crew of a vessel resists a person in authority over him while in the discharge of his duty, the latter may lawfully use sufficient force to overcome resistance. *Pendergrast v. Lampman*, 54.

ATTACHMENT.

1. An attachment will lie against the goods of a debtor who is about to dispose of them with intent to delay or defraud the plaintiff in the action without reference to the defendant's conduct or purpose as to his other creditors. *Correy & Haizlette v. Lake & Lake*, 469.
2. Proof of a general intent by the defendant to dispose of his property for the purpose of preventing a particular creditor from collecting his demand, by legal proceedings, is sufficient proof that the defendant is about to do so, whenever such creditor brings an action to recover his debt. *Id.*
3. Effect of re-delivery of property, taken on attachment, under sections 152 and 157 of the Civil Code (Or Code, 178-9), to the defendant. *Id.*

AUTHENTICATION.

Sufficiency of Records of State Courts in U. S. Court, See EVIDENCE, 2, 3,

BANKRUPTCY.

1. No. 61 of the forms of proceeding in bankruptcy, is merely a demand for a jury trial, and not an answer to the petition—it is neither a showing of cause nor an allegation by the respondent, and the denial contained in it, is to be taken as the mere recital by the clerk of a denial already and otherwise made by the respondent to his answer to the petition. *In re Sutherland*, 344.
2. Whether the answer or plea of the respondent to the petition should be general or specific or verified or not, must depend upon the rules of the Court in which the petition is pending. *Id.*
3. The general rule of this Court being that answers must be specific and verified, and the true object of pleading in any case being to narrow the controversy to the point really in dispute, no greater latitude ought to be allowed the defence in bankruptcy in this respect, than in ordinary actions and suits. *Id.*
4. Where a petition alleged that the respondent, with knowledge of his insolvency, confessed two judgments in favor of third persons with intent to give a *fraudulent* preference to such persons, and the answer of the respondent tacitly admits the confession of said judgments and insolvency, but denies that the same were confessed "with any *fraudulent* intent or with the *fraudulent* intent to give a *fraudulent* preference." *Held*, that the issue taken by the answer upon the word *fraudulent* in the petition was an immaterial one, and that a confession of judgment by an insolvent debtor necessarily gave a preference to the creditor in such judgment and ought therefore, in the absence of sufficient allegation or proof to the contrary, to be presumed to have been so intended. *Id.*
5. Where the respondent by his answer admits, that being insolvent, he confessed a judgment in favor of one of his creditors, but denies that he thereby *fraudulently* intended to give such creditor a *fraudulent* preference, there is an *affirmative implication* that such judgment was confessed

with intent to give a preference, and the petitioner is entitled to judgment on the pleadings. *Id.*

6. In effect, the Bankrupt Act (§39) prohibits an insolvent debtor from giving *any* preference for *any* reason to *any* creditor, upon pain of being declared a bankrupt therefor, on the petition of his other creditors. *Id.*
7. A judgment for a fine is not a debt provable in bankruptcy. In *re* Sutherland, 416.
8. When the grounds of opposition to a bankrupt's discharge, are insufficient in law to prevent such discharge, the bankrupt may demur to the specification thereof. In *re* Burk, 425.
9. An error in an allegation in a bankrupt's petition, is not a sufficient objection to his discharge, unless it has been sworn to by the bankrupt with knowledge of its falsity. *Id.*
10. It is a good ground of opposition to a bankrupt's discharge, that he "has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors" (§29), either *before* or *since* the passage of the act. *Id.*
11. But a person who was not a creditor of the bankrupts at the time of such removal, or whose debt was then barred by lapse of time, could not have been defrauded by it, and therefore cannot make the objection. *Id.*
12. No one has a standing in a Court of bankruptcy, as a creditor, so as to be entitled to oppose a bankrupt's discharge, until he has proved his debt. *Id.*
13. The allegations in opposition to a bankrupt's discharge, must be separate, certain and specific, and therefore an allegation that the bankrupt in May, 1865, removed a part of his property from the district, with intent, etc., is too vague and general. *Id.*
14. An adjudication declaring a person a bankrupt, is in the nature of a judgment *in rem*, and therefore notice to and binding upon all the world. In *re* Wallace, 433.
15. Under the Bankrupt Act of 1867 (§1), the several District Courts have equity jurisdiction and power over "all acts, matters and things to be done under and by virtue of the bankruptcy," and are authorized by summary proceedings to administer all the relief which a court of equity could administer under the like circumstances upon regular proceedings. *Id.*
16. Notice of an application for an injunction in bankruptcy need not be given, unless specially directed; and the provision in the act of March 2, 1793 (1 Stat. 334) prohibiting writs of injunction from being granted, except upon notice to the adverse party, applies only to suits in equity in the Supreme and Circuit Courts. *Id.*
17. In exercising the equity power which pertains to a District Court, as a Court of bankruptcy, it is not deemed necessary or proper that resort should be had to the plenary proceedings common to suits in equity; but a petition stating the facts and praying the particular relief sought, is sufficient. *Id.*

18. Where a creditor obtains a confession of judgment from an insolvent debtor, and it appears probable that such confession was taken with knowledge of the debtor's insolvency, the proof of such creditor's claim will be postponed until after the choice of the assignee. In *re Walton and Walton*, 442.
19. Objection to proof of a claim must be made by written allegation, specifying with reasonable certainty the grounds of such objection. *Id.*
20. Proof of a debt against a partnership should not be joined with proof of a debt against an individual partner. In *re Walton and Walton*, 510.
21. Proof of a debt should show with reasonable certainty whether it was contracted by a partnership or the individual partners. *Id.*
22. A claim not duly proved must be rejected; and a claim is not duly proved unless it appears from the statement of the deponent thereto, that a debt exists which the creditor has a present right to have paid out of the estate of the bankrupt. *Id.*
23. The prohibition of "further proceedings" in the last clause of section 40 of the Bankrupt Act, applies only to the direct proceedings upon the petition, and not to collateral proceedings by or against third persons or even the debtor. In *re Muller and Bretano*, 513.
24. Under a warrant to take possession of the property of the debtor, the messenger is authorized to take such property in whosoever hands he may find it; and if by mistake, or otherwise, he should take property not belonging to the debtor, it is no ground for discharging the warrant or vacating the order for its allowance; but the party aggrieved by such wrongful seizure has his remedy against the officer making it. *Id.*
25. Injunctions and warrants may be allowed and issued under section 40 of the Bankrupt Act without notice to the adverse party. *Id.*
26. The Court takes judicial notice of the Acts of Congress, and they need not be set forth or referred to in any proceeding before it. *Id.*
27. The warrant provided for in section 40 of the Bankrupt Act may issue against the *person* and *property* of the debtor, or *either* of them. *Id.*
28. The jurisdiction of the Bankrupt Court to enjoin third persons from interfering with the goods of the debtor, or to issue a warrant to take provisional possession of them, does not depend upon the service of a debtor of a proper order to show cause why he should not be adjudged a bankrupt, but upon the filing of a petition in bankruptcy against such debtor. *Id.*
29. A petition which states that the debtor committed the alleged acts of bankruptcy, "within six calendar months next preceding the date, thereof," and on or about a certain day therein, is sufficiently certain in this respect; and as to third persons in collateral proceedings, the allegation is sufficient without the mention of a particular day. *Id.*
30. The allegations in the petition concerning the existence of the debt, or the commission of the acts of bankruptcy, need not be made upon the personal knowledge of the petitioner; but, *semble*, that the deposition thereto should be made upon the knowledge of the deponent, or

disclose the grounds of his belief, or the sources of his information. *Id.*

31. The Bankrupt Act should be construed so as not to permit a petition in bankruptcy to be maintained by a creditor, who became such after the commission of the act of bankruptcy complained of. *Id.*
32. It is sufficient if the debt of the petitioner *existed* at the date of the commission of the act of bankruptcy, although not then due. *Id.*
33. Upon a motion to dissolve an injunction in bankruptcy against third persons, such persons cannot be heard to object to the sufficiency of the petition or the proof of debt, or acts of bankruptcy. *Id.*
34. The Bankrupt Act is remedial, and should be construed "with a view to effect its objects, and promote justice" between a debtor and his creditors. *Id.*
35. The facts concerning an alleged act of bankruptcy should be stated in the petition with such certainty and detail, as to inform the debtor of what he is required to make proof or explanation, as provided in section 41 of the act. In *re* Randall and Sunderland, 557.
36. An allegation in a petition that the debtor being a trader, stopped payment of his commercial paper within a period of fourteen days, is too indefinite to put the burden of proof upon the debtor concerning such alleged stoppage, and may be disregarded as immaterial. *Id.*
37. An insolvent is one who is unable to pay his debts in full at once, or as they become due. *Id.*
38. An assignment of his property by an insolvent person for the purpose of having the same distributed among his creditors, is presumed to have been done with intent to defraud the operation of the Bankrupt Act, by preventing such property from coming to the assignee in bankruptcy and being distributed under the act, and is therefore an act of bankruptcy. *Id.*
39. An assignment by a *solvent* person of *all* his property to a trustee for the equal benefit of the creditors, is an act of bankruptcy, because it hinders and delays creditors in the collection of their debts, and for the same reason is void under the Statute of Frauds. *Id.*
40. A creditor has no standing in Court to oppose the discharge of a bankrupt, unless he enter his appearance in opposition thereto, within the day appointed for showing cause against the petition therefor. In *re* Sutherland, 573.
41. Where there is no opposing party to the discharge, the proceeding may continued from time to time, to suit the convenience of the bankrupt. *Id.*
42. A creditor who has entered his appearance in opposition to a discharge, cannot maintain a motion to dismiss the petition for want of prosecution, but should move to set it down for hearing upon the objections thereto, if any, filed. *Id.*
43. The final oath of a bankrupt is not a pleading, but is in the nature of indispensable evidence in support of the petition for discharge, and need not be made or filed until the hearing. *Id.*

44. A willful omission to state a debt due by the bankrupt to another in his schedule is good ground for refusing a discharge. In *re Kallish*, 575.
45. *Quere*, that persons not prejudiced by such omission, should not be heard to object thereto. *Id.*
46. Discharge refused, the opposing creditor's right to be heard in opposition thereto not being questioned. *Id.*
47. The "business of a contractor" is not a "trade, occupation or profession" within the meaning of the act (Or. Code, 211), exempting certain tools and implements from execution. In *re Whetmore*, 585.
48. Where the affidavit to a schedule states in the prescribed form, that it contains a statement of all the bankrupt's estate, its truth is not affected by an erroneous claim in such schedule that a certain article therein mentioned is exempt from execution. *Id.*
49. If the bankrupt makes an erroneous claim to property mentioned in the schedule, as being exempt from the operation of the Bankrupt Act, it is the duty of the assignee to correct or disregard it. *Id.*
50. Where a bankrupt, in pursuance of an arrangement with a certain creditor, omits his debt from his schedule, such creditor will not be permitted to object to the bankrupt's discharge on that ground. *Id.*
51. Where a creditor takes a preference from an insolvent debtor, with reason to believe that such debtor was then insolvent, and intended to evade the provisions of the Bankrupt Act by preventing his property from being distributed thereunder among his creditors, such creditor is barred from proving his debt, and may be compelled to restore property so taken to the assignee. In *re Walton and Walton*, 598.
52. The Bankrupt Act does not trust the legal rights of one portion of the creditors of an insolvent to the judgment or good intentions of another portion, and therefore it makes no difference with what ultimate intention a creditor takes a preference contrary to the act, he thereby forfeits his right to prove his debt. *Id.*

BILL OF LADING.

See COMMON CARRIER, 1, 4, 9.

BOND.

See CONTRACT, 4, COVENANT.

CARRIER.

See COMMON CARRIER.

CITIZENSHIP.

See JURISDICTION, 3, 4.

COLLECTOR.

See REVENUE, 8, 12, 13; EVIDENCE, 4.

COMMON CARRIER.

1. In a suit against a common carrier, the libellant makes a *prima facie* case, by producing the receipt of the carrier—"Received in good order;" but these words do not constitute an agreement, they are a mere admission, and may be explained or contradicted by the carrier. *The Pacific*, 17.
2. In the National Courts the rule is, that a common carrier may limit his liabilities by an *express* agreement—so far as the common law makes him an insurer—but not for the negligence of himself or servants. *Id.*
3. Nothing short of an *express* stipulation will constitute such an agreement; it must not depend upon implication, or inference, or conflicting or doubtful evidence; and mere notice to the shipper is not sufficient. *Id.*
4. Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship for the same, containing the words—"not accountable for contents;" this of itself does not constitute such an agreement; it is a mere *ex parte* proposition on the part of the carrier after the receipt of the package, to which there must be direct and unequivocal evidence of the assent of the shipper to exonerate the carrier. *Id.*
5. In a suit *in rem*, it is not necessary to charge the defendant as a common carrier, but the rule is otherwise where the suit is *in personam*; but in the former case it must appear from the evidence that the ship was employed in the business of a common carrier. *Id.*
6. The burden of proof, to show the value of goods injured or not delivered, lies upon the shipper. *Id.*
7. Where an ocean steamer is making regular voyages to a port, and for any reason she is unable to reach such port, and the agent of her owner charts a steamboat to take the passengers and freight down a river to such steamer and bring back her cargo, a delivery of goods under such circumstances to the steamboat for the purpose of being conveyed by such steamer, is a delivery to the latter, and she is thenceforth bound for their safe carriage and timely delivery. *The Oregon*, 179.
8. Where a vessel is discharging and taking on cargo at a wharf, a delivery of goods thereon by the direction of the master, for the purpose of carriage upon the same, is a delivery to such vessel, and her responsibility for the carriage and delivery thereof commences from that time. *Id.*
9. A common carrier gave a receipt for two casks of wine, received in good order, and agreed to deliver them in like condition at the end of the voyage, the dangers of navigation excepted; in a suit by the shipper for the non-delivery of the goods, the carrier claimed that the wine was lost on the voyage on account of the dangers of navigation and insufficiency of the casks; *Held*, that the burden of proof is upon the carrier to show that the loss arose from the insufficiency of the casks or the dangers of navigation; and that, if upon the whole proof it was doubtful whether the loss arose from either of such causes, the shipper must recover. *The Live Yankee*, 420.

CONGRESS.

Power of, to suspend writ of habeas corpus and to protect officers and others in making illegal arrests. See FALSE IMPRISONMENT, 5, 7.

Acts of, See STATUTES OF UNITED STATES.

See COPYRIGHT, 5, 6; PILOTS, 6, 8.

CONSIDERATION.

See *Nudum Pactum*.

CONSTITUTIONAL LAW.

Of United States, See FALSE IMPRISONMENT, 5, 6, 7, 8, 9, 10.

COPYRIGHT, 5, 6.

Of Oregon, As to imprisonment for debt, See ARREST, 3, 4.

As to rights of Married Women, See MARRIED WOMEN, 2, 5, 8.

CONSTRUCTION.

1. Under Section 14, Act of August 14, 1848 (9 Stat. 329), which provides that the laws of the United States should be in force in the Territory of Oregon, "so far as the same, or any portion, may be applicable," the power is devolved upon the Court, when the question arises, to determine what laws are "applicable" and what are not: and in determining this question, the Court is not bound by any construction which the administrative department of the Government may have given to such provision, in the discharge of its duties. *Lownsdale v. City of Portland*, 1.
2. With the policy or impolicy of an act of Congress, Courts and juries have nothing to do. *U. S. v. Brown*, 566.
See COPYRIGHT, 3, 4, 5, 6; REVENUE, 10, 11; PILOTS, 9, 10, 11; LANDS PUBLIC, ORGANIC ACT.
Of Bankruptcy Act, See BANKRUPTCY.

CONTRACTS.

1. Rule of ascertaining rate of wages of seaman, where the contract is doubtful, in case of an engineer on inland waters, commented on and applied. *The Pioneer*, 72.
2. Misconduct by seaman upon one voyage does not enure to the benefit of the owner so as to forfeit wages earned upon another; in this respect the case of monthly hirings, although continuous, upon river boats, likened to separate voyages at sea. *Id.*
3. A party cannot recover upon a contract prohibited by statute, although the statute contain no express declaration that such contract shall be void; therefore when libellant served as an engineer upon a steamboat from November 8, 1862, to July 13, 1863, without being licensed therefor by the United States Inspectors, he could not recover wages for such service, because it was within the prohibition of Section 9, Sub. 10, of the Act of August 30, 1852. (10 Stat. 67.) *Id.*

4. A condition in a bond that trustees should be incorporated by legislative enactment, and thereby authorized to hold a lot for the use of the town of Portland, for school and meeting-house purposes, "exclusive of any restrictions of any school law," is not void, as being contrary to public policy. *Chapman v. School Dist. No. 1, et al.* 139.

See COMMON CARRIER, 1, 2, 3, 4; COVENANT; ADMIRALTY, 2, 3; *Nudum Pactum*.

COPYRIGHT.

1. Where a party seeks to enjoin another from the exhibition or performance of a spectacle or dramatic composition, he must show an exclusive right in himself to the use of such spectacle or composition, before his application will be allowed. *Martinetti v. Maguire*, and *Maguire v. Martinetti*, 216.
2. Where two spectacles, called respectively the Black Crook and the Black Rook, produced the impression upon those who witnessed them that they were substantially the same: *Held*, that one was a colorable imitation of the other. *Id.*
3. The act of August 18, 1856 (11 Stat. 138), which gives "the proprietor of a dramatic composition, designed or suited for public representation," the sole right to represent the same, does not include a mere exhibition, spectacle or arrangement of scenic effects having no literary character—the same not being a "dramatic composition" within the meaning of the act. *Id.*
4. The act aforesaid purports only to apply to dramatic compositions "suited to public representation," and therefore it ought not to be construed to protect the proprietor of a composition of an immoral or indecent character, in the exclusive right to represent the same. *Id.*
5. In the exercise of its power to secure "to authors and inventors the exclusive right to their respective writings and discoveries," (Con. Art. I, § 8, sub. 8), Congress may discriminate in favor of good morals, and against vice. *Id.*
6. The power aforesaid is conferred on Congress, not generally, but only as a means to this particular end—"To promote the progress of science and useful arts"—therefore, it seems that it does not extend to writings of a grossly immoral or indecent character, or to inventions expressly designed to facilitate the commission of crime. *Id.*

CORPORATION.

1. The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a Court of equity. *Newby v. O. C. R. Co.*, 609.
2. A corporate name is a necessary element of a corporation's existence, and any act which produces uncertainty or confusion concerning such name, is well calculated to injuriously affect the identity and business of the corporation. *Id.*
3. The right to a corporate name does not rest in parol, but is shown by the record and is triable by inspection thereof in any form of proceeding

- therefore a Court of equity will not refuse to enjoin the use of such name because the right to the same has not been established at law. *Id.*
4. The jurisdiction to enjoin the use of a corporate name does not depend upon the insolvency of the defendant.
 5. The insolvency of a corporation, the legality of the subscription to its capital stock, and the validity of its organization generally, may be judicially investigated, whenever and wherever such investigation becomes material to the determination of the rights of third persons, who are parties to a judicial proceeding before the Court. *Id.*
 6. Where a creditor of a corporation, as a bondholder, has a lien upon a grant of land or other property owned or claimed by such corporation, and another corporation is wrongfully using such corporation's name for the purpose of obtaining such grant of land, such creditor may maintain a suit in equity to enjoin such other corporation from such wrongful use of his corporation's name. *Id.*
 7. An agreement by a corporation to prefer its bondholder in the disposition of 50 per centum of the proceeds of its lands, which may be sold before such bond becomes due, does not give such bondholder a lien upon the corporation lands. *Id.*
 8. *Quere*, can a mere bondholder of a corporation maintain a suit to enjoin another corporation from doing unlawful acts which depreciate the conventional value of such bond in the market. *Id.*
 9. In a suit to enjoin the use of a corporate name, the corporation whose name is alleged to be wrongfully used must be a party plaintiff or defendant, but if such corporation refuse to bring such suit upon request, its bondholder or creditor may do so, and make such corporation a party defendant. *Id.*

Municipal, See EQUITY, 5, 6, 7, 8, 9.

Foreign, See SALE OF SHIPS, 1, 2.

COUNTER CLAIM.

See POST MASTER.

COURTS.

Jurisdiction of, See JURISDICTION.

See DIVORCE, 1; EQUITY, 4, 5, 9; EVIDENCE, 2; PARENT AND CHILD.

COVENANTS.

1. The assignee of a covenant for title, may maintain a suit to enforce the performance of such covenant, against the heir of the covenantor, to the extent of the interest inherited, although such covenant was the joint covenant of the ancestor and another, and such heir is not named therein. *Fields v. Squires*, 366.
2. A covenant which runs with the land, is divisible into as many parts or interests as the land itself may be divided by subsequent successive conveyances, and the grantee of each parcel of interest may, as to the same,

maintain suit upon such covenant against the original covenantor, or his legal representatives. *Id.*

3. On June 25, 1850, no law had been passed by Congress for the disposal of the public lands in Oregon, and it was well known to all persons resident therein, that no one had an interest in such lands, except the bare possession, and on said day Lownsdale, Coffin and Chapman by their deed, wherein they described themselves as proprietors of the town of Portland, Oregon, for a valuable consideration, "thereby released, quit-claimed and confirmed" unto said Chapman, block G in said town, and delivered him the possession thereof: said deed contained two covenants—one of warranty against all claims, the United States excepted, and the other to convey the title of the United States if the covenantors obtained the same; *Held*, that the grantee in said deed took nothing thereby, except the actual interest of the grantors at the time—the possession. *Id.*
4. By the first of said covenants, Lownsdale, and those claiming under him, are rebutted from claiming any interest in block G, however acquired, except an interest or title derived from the United States. *Id.*
5. Nancy Lownsdale, the wife of a settler under section 4 of the donation Act died intestate, after the provisions of such act had been complied with, and before the issuing of a patent for the donation, leaving her husband and four children living: *Held*, that her estate in the land was a qualified fee, and terminated with her life, and that the remainder was given by said section 4 directly to said husband and children in equal parts, who took the same as the donees of the United States, and not as the heirs of said Nancy; and that the interest thus acquired by said husband, is within the second of said covenants—the one for further assurance. *Id.*
6. A covenant to convey a particular title if after acquired by the covenantor may be enforced by a suit in equity, if such covenantor neglect to perform the same, without a prior demand and refusal. *Id.*
7. The possession delivered with the deed of June 25, 1850, was a sufficient estate to carry the covenants therein to the assignee thereof. *Id.*
8. The prohibition contained in the proviso to section 4 of the donation Act, does not include covenants or contracts made prior to the passage of such act. *Id.*
9. The deed of June 25, 1850, is not within section 6 of the act of September 29, 1849, to regulate conveyances, and therefore cannot be construed as containing any covenants not specially set forth therein. *Id.*

See CONTRACTS, 4.

CREDITORS.

See MARRIED WOMEN, 6 to 17; BANKRUPTCY, 32, 50; ATTACHMENT, 1, 2.

CRIMINAL LAW.

1. Upon an indictment for perjury, an affidavit of the defendant's directly contradicting the one upon which the perjury is assigned, is not sufficient evidence of the falsity of the latter. *U. S. v. Mayer*, 127.

2. Under the Internal Revenue Act of June 30, 1864 (13 Stat. 239), a merchant in making his statement of income, is entitled to deduct from his gross profits the bad debts made during the year to which the statement relates, or such as appear to be bad at the end of the year. *Id.*
3. The falsity of the oath upon which perjury is assigned may be shown by the books and papers of the defendant, kept under his control and subject to his inspection. *Id.*
4. Effect to be given to the testimony of hostile or friendly witnesses. *Id.*
5. Evidence of good character, effect of, upon trial of a criminal charge. *Id.*
6. A sale of spirituous liquors, without a license therefor first obtained, is a violation of section 73 of the act of June 30, 1864 (13 Stat. 249), although the party making such sale intended at the time to give the proceeds thereof to the sanitary commission or other charitable use. *U. S. v. Dodge*, 186.
7. Reputation is competent proof of the name of a person, place or house; and, therefore, upon the trial of an indictment against one Dodge for selling liquor without license, the government was allowed to prove that the house where the witness bought the liquor was called *Dodge's*, and that the name of the man who kept it was called *Dodge*. *Id.*
8. Power and duty of a jury in judging of the credibility of witnesses, and the value or effect of evidence. *Id.*
9. An indictment, in which there is a joinder of offences or offenders, so far as the jury are concerned is to be considered as a several one as to each of such offences or offenders. *U. S. v. Davenport*, 264.
10. When an indictment contains two or more counts upon distinct offences or upon different statements of the same offence, the jury may find a verdict of guilty or not guilty upon any or all of such counts, and if there is any count upon which they are not agreed, they may be discharged without giving a verdict thereon; and such count will stand for re-trial. *Id.*
11. The verdict of a jury regularly given is presumed to be right until the contrary appears, and should be sustained by the Court, if the evidence, by any fair construction, will warrant such a finding. *U. S. v. Randall*, 524.
12. False and contradictory statements by the defendant about the material circumstances of the crime with which he is charged, are badges of guilt. *Id.*
13. The falsification of records by the defendant, with reference to a matter in which he is charged or suspected of wrong-doing or liable to be so suspected or charged, is strong presumptive evidence of guilt. *Id.*
14. Special circumstances not consistent with defendant's innocence, together with a particular opportunity and temptation to commit the crime charged, to be considered in support of verdict of guilty. *Id.*
15. Section 2 of the act of March 3, 1868 (13 Stat. 500), regulating peremptory challenges in criminal cases, does not give the right to such challenge except in capital cases, because when the act was passed such right did not exist by law in any other cases, but was only permitted by rule of Court. *Id.*

16. When it appears from the evidence that the defendant has made a false statement about the circumstances of the commission of a crime, with which he is charged, he may show that he had good reason to believe at the time the statement was true. *Id.*
17. Gold dust in packages not weighing more than four pounds and paying letter postage, is mailable matter, and whether it is not, under section 12 of the act of July 1, 1864 (13 Stat. 337), any person employed in the post-office who steals the same from a letter in the mail, is guilty of a crime. *Id.*

COURTESY.

See MARRIED WOMEN, 1, 4.

CUSTOMS.

See REVENUE, 1, 2, 3, 4, 5, 6, 7, 8.

DAMAGES.

Measure of, See FALSE IMPRISONMENT, 1, 2, 3.

For goods lost at sea, See ADMIRALTY, 4, 5.

DEBT.

See BANKRUPTCY, 20, 21, 22.

DEDICATION.

1. A dedication to public uses, by a release, upon condition that a pending suit concerning the premises shall be dismissed, does not take effect in case said suit is not dismissed. *Lovnsdale v. City of Portland, et al.* 1.
2. A dedication to public uses by a release, without covenants, by a person who is a mere occupant of the public land, without other estate or interest therein than the bare possession, does not bind an after-acquired estate in the same premises. *Id.*
3. A dedication of land in Oregon to public use by an occupant thereof, prior to September 27, 1850, does not bind or estop a subsequent occupant of the same lands. *Lovnsdale v. City of Portland et al.*, 39.
4. The exhibition or publication of a map or plan of a town by the proprietor thereof, upon which certain spaces are marked as streets and public squares, is evidence of a dedication of such spaces to public use as streets and squares. *Id.*
5. When a dedication of ground to public uses is attempted to be established by proof of casual conversations and remarks by the owner, susceptible of various meanings and constructions, such proof should be closely scrutinized, and unless in harmony with the established circumstances of the case, but little heeded. *Id.*
6. As against the general owner, a dedication of land to public use is not to be presumed, but must be proved; and when the evidence consists of the parol acts and declarations of such owner, they ought to be of such public and deliberate character as to be generally known and not of doubtful import. *Id.*

7. The adoption, by the Common Council of Portland, of a map upon which Front street is represented as being bounded by two parallel lines, so as not to include a strip of land lying between it and the Wallamet river on the east, is a solemn admission by the corporation of Portland that said strip of land is not a part of Front street. *Id.*
8. A release without covenants by a party in possession does not affect an after-acquired estate in the same lands by the releasor. *Id.*
9. A dedication of land to public uses by parties in possession thereof, prior to the passage of the Donation Act of September 27, 1850 (9 Stat. 496), does not affect such land in the hands of other persons who may succeed them in such possession. *Chapman v. School District No. 1, et al.*, 139.
10. Although by the terms of the Donation Act, the land is granted to the settler, in consideration of his occupation thereof, prior, as well as subsequent to the passage of such act, the grant itself does not take effect prior to or relate back beyond such passage, and therefore, a parol dedication or quitclaim to public use of a portion of such land by such settler, prior to the passage of such act, does not affect the after acquired estate in the premises. *Id.*
11. A dedication by parol, being an attempt to pass an interest in lands, contrary to the statute of frauds, should not be allowed, unless plainly proven, and ought not to be inferred from facts not inconsistent with a contrary conclusion. *Id.*
12. A multitude are no more meritorious in the eyes of the law, than a single person, and it ought not to be presumed that the latter has parted with his property, without benefit to himself, because a whole community, however numerous, lay claim to it. *Id.*
13. A dedication to public uses, alleged to have been made within the memory of living witnesses, cannot be proved by reputation. *Id.*

See ESTOPPEL, 1.

DEED.

See COVENANTS, 1, 2, 3; MARRIED WOMEN, 4, 7, 8, 9, 12, 15, 16; *Nudum Pactum*.

DELIVERY.

See COMMON CARRIER, 4, 6, 7, 8, 9; ATTACHMENT, 3.

DEMURRER.

See PLEADINGS, 1, 2, 3, 4, 9, 10, 13, 15, 16, 17, 20, 21, 22, 24, 26, 27, 28, 29.

DEPOSITION.

See BANKRUPTCY, 29, 30.

DESERTION.

See HABEUS CORPUS, 2, 3.

DILIGENCE

Of Master and Crew, See ADMIRALTY, 4, 5; COMMON CARRIER, 2, 9.

DISCHARGE.

See BANKRUPTCY, 7 to 14, 39 to 47.

DISTRICT ATTORNEY.

1. The Act of March 3, 1863, section 11 (12 Stat. 741), does not give District Attorneys a per centum on the amount of a judgment or decree obtained by them in favor of the United States, but only upon the sum actually collected or realized thereon. *The Pacific*, 192.
2. The words "collected" and "realized," as used in said section, are substantially synonymous; and money is not "realized" by the United States within the meaning of the same, until it has received the same or the benefit of it. *Id.*
3. Amount allowed District Attorney for attending an examination to procure remission of a forfeiture under section 50 of the Collection Act of March 2, 1799 (1 Stat. 665). *Id.*

DIVORCE.

1. In a suit for a divorce, the statute of California (Hittell's Laws, §2, 410), gives the Court power to make such order for "the maintenance and education of the children of the marriage, as may be just." Held, that as a proper means of exercising this power, the Court may award the custody of such children to either parent; and that although such award may appear unauthorized by such statute as construed in another forum, it cannot be questioned in such forum collaterally. *Bennett v. Bennett*, 299.
2. The domicile of the wife follows that of the husband during the existence of the marriage relation, but a divorce leaves the wife at liberty to choose her own domicile, and therefore where parties living in California where divorced, and the man removed to Oregon and acquired a domicile here while the woman remained in California, they became citizens of different States, and the latter may maintain an action against the former in the National Courts in Oregon, on account of such difference of citizenship. *Id.*
3. A decree of divorce, given in a Court of California, which provides that it may be modified upon the application of either party—sufficient cause being shown therefor—is not a temporary decree; and the presumption is that it remains unchanged, which presumption can only be overcome by record evidence to the contrary. *Id.*

DOMICIL.

See DIVORCE, 2.

DONATION ACT.

See LANDS PUBLIC; COVENANT, 5, 8; DEDICATION, 3, 9, 10.

DURESS.

1. An illegal demand paid under *duress* of property may be recovered back; but real property is not in *duress* unless there be an illegal demand made against the owner, coupled with a present power or authority, in the person making such demand, to sell or dispose of the same, if payment is not made as demanded. *Mariposa Co. v. Bowman*, 228.

DUTIES.

Goods subject to, See REVENUE, 1 to 10; TAXES, 2.

EASEMENTS.

See DEDICATION.

EJECTMENT,

See PLEADINGS, 4 to 9, 17 to 21.

ENGINEER.

Unlicensed, See CONTRACTS, 3.

EQUITY.

1. Where the title of the complainant, whether legal or equitable, is not doubtful or suspicious, equity will take jurisdiction and decree partition, whether the complainant be in the actual possession or not; but in the case of an alleged legal title, if either of these objections appear, it is usual to send the complainant to a Court of law, to try his title, and retain the suit to await the result; and in case of an equitable title a Court of equity first ascertains the title, and if found for the complainant, then makes partition. *Lamb et al. v. Starr et al.*, 350.
2. The possession of one tenant in common, is that of his co-tenant, and where possession is necessary, such co-tenant may maintain a suit for partition upon such possession. *Id.*
3. In equity a defendant is not entitled to plead more than one plea without leave of the Court, and such leave will only be given when the necessity therefor is obvious. *Id.*
4. The jurisdiction of a Court of equity to remove a cloud upon title to real property, is confined to instances where the instrument or proceeding complained of appears to be valid on its face, but is in fact void or invalid, for some reason or matter, which can only be shown by extrinsic evidence; but, *semble*, that such Court has jurisdiction to prevent a cloud being cast upon title to real property, without reference to the fact whether such instrument or proceeding appears to be valid on its face or not. *Coulson et al. v. City of Portland et al.*, 481.
5. A Court of equity has jurisdiction to enjoin a municipal corporation from committing a breach of trust concerning property or franchises held by it for the inhabitants thereof, but an ordinance providing for levying a tax is an exercise of legislative power, in the enactment of which such corporation acts not as a trustee, but as a local government, exercising a portion of the supreme power of the State. *Id.*

6. A Court of equity will enjoin a municipal corporation from unlawfully issuing interest coupons, payable through a period of twenty years, and levying a tax for the payment thereof, upon the complaint of an owner of property liable to such tax, so as to prevent a multiplicity of suits. *Id.*
7. Where a municipal corporation which has power to construct public buildings, but is forbidden "to raise money for or loan its credit to or in aid" of any private corporation, passes an ordinance providing for contracting with a railway company for the erection of public buildings, a Court has no power to inquire whether the real object of such ordinance is to provide for the construction of such buildings or to raise money, etc., in aid of said railway company. *Id.*
8. Section 135 of the charter of Portland, prohibited the city from contracting an indebtedness exceeding \$50,000: *Held*, that an ordinance assuming a liability of \$350,000, to be paid in semi-annual installments in the course of twenty years, although it provided for the payment of such installments by the levy of taxes as they fell due, was in violation of such section and void. *Id.*
9. A Court of equity has no power to restrain a municipal corporation in the disposition or management of taxes collected under a void ordinance, on the complaint of a single property holder therein. *Id.*

See COVENANTS.

ESTOPPEL.

1. A decree in a suit between P., a lot-holder in the town of Portland, and L., C. and C., settlers upon the Portland land claim, declaring a certain strip of land to have been dedicated to the public, cannot be pleaded as an estoppel in a suit by the grantee of L. against the town of Portland, concerning a portion of the same premises—the municipal corporation and P. are not privies. *Lownsdale v. City of Portland et al.*, 1.
2. Estoppel *in pais*, what declarations and conduct of party insufficient to create. *Fields v. Squires et al.*, 366.

See DEDICATION, 3, 11, 13.

EVIDENCE.

1. The Court has not judicial knowledge whether there are matches known to the arts and commerce other than those called *lucifer* or *friction*, and therefore not subject to duty. *U. S. v. Walsh*, 281.
2. The National and State Courts not being foreign to one another, as the State Courts are, but subordinate parts of a complete system of government, with limited and separate jurisdictions, and the former having judicial knowledge of the laws of the several States, and, therefore of the mode of authenticating the judicial records thereof: *Semble*, that the act of May 26, 1790 (1 Stat. 122), prescribing the mode of proving the judicial records of a State when used in another State, does not apply to a case where such record is sought to be used in a National Court. *Bennett v. Bennett*, 299.

3. The certificate of a judge to the form of attestation of a clerk to a copy of the record of a State Court, did not show whether he was the *sole* judge, *chief* justice or *presiding magistrate* thereof, but it appeared from the laws of such State relating to the organization of such Court, that it consisted of a single judge: *Held*, that the authentication was sufficient under the act of May 26, 1789 (1 Stat. 122). *Id.*
 4. The act of July 13, 1866 (14 Stat. 143), provides that a party having an interest in an instrument issued without being stamped, may have a stamp affixed thereto, by applying to "the collector of internal revenue of the *proper* district." *Quære*, is the *proper* district, the one where the instrument was issued, or where it is owned or sought to be used? *Id.*
 5. In equity, the general rule is that the separate answer of one defendant is not evidence to support the complainant's cause as against a co-defendant; and the exceptions to this rule appear to be limited to cases where the defendants stand in such relation to one another as to render their admissions out of Court evidence against each other. *Dick v. Hamilton et al.*, 322.
 6. In considering the evidence, a jury is bound to act deliberately and according to the dictates of reason and the teachings of experience. *U. S. v. Brown*, 566.
 7. The law presumes, and, until the contrary appears, juries are bound by such presumption, that a witness speaks the truth. *Id.*
 8. A box of sardines being sold unstamped, the presumption is that it never was stamped, but such presumption may be overcome by showing that the stamp had been lost or removed by accident, or the like. *Id.*
 9. A jury is not formed to reflect by its verdict the state of public opinion touching the questions involved in the case on trial. *Id.*
 10. Interest of a witness in the result of the action to be considered by the jury. *Id.*
- See COMMON CARRIERS, 1, 2, 3, 4, 5, 6, 9; PILOTS, 1, 2; DEDICATION, 4, 5, 6, 7, 11, 13; CRIMINAL LAW, 1, 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 16; ACTION; CORPORATION, 3; LANDS PUBLIC, 5.

EXEMPTION.

Contractor's tools not exempt from execution. See BANKRUPTCY, 47.

FALSE IMPRISONMENT.

1. In an action for false imprisonment where the arrest complained of was illegal, but was caused by the defendant, while acting as commanding officer of a military department of the United States, without malice or intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety, the plaintiff is only entitled to recover compensatory damages. *McCall v. McDowell et al.*, 233.
2. The defendant having caused the arrest and imprisonment of the plaintiff, who was a civilian and not amenable to military law, it was his duty to make provision against his being treated with undue harshness

and severity, or subjected to any treatment or discipline not necessary and proper to restrain him of his liberty for the time being, and having failed to do so, and suffered the plaintiff to be confined in the guard house, with drunken soldiers, and to be compelled to labor in common with military culprits, the damages for the false imprisonment must be enhanced on account of such treatment. *Id.*

3. In an action for false imprisonment, the defendant by his gross and incendiary language on the news of the assassination of Abraham Lincoln, the President of the United States, having provoked his arrest, though the same was illegal, such provocation must be taken into account in mitigation of damages. *Id.*
4. A military subordinate is not liable in damages for making an illegal arrest, if he acted in pursuance of an order from his superior, which was legal on its face; the liability for the false imprisonment is confined to the officer who gave the order.
5. Congress is the exclusive judge of "when in cases of rebellion or invasion" the public service requires the suspension of "the privilege of the writ of habeas corpus;" in such case it may suspend the privilege of the writ generally or in particular cases; and it may suspend it directly, or it may commit the matter within the proper limits, to the judgment of the President of the United States. *Id.*
6. The practical object of suspending the privilege of the writ of habeas corpus being to permit and authorize the arbitrary arrest and imprisonment of persons against whom no legal crime can be proved, but who may nevertheless be actively engaged in fomenting the rebellion or inviting the invasion to the imminent danger of the republic, it follows as a necessary consequence, that under the power "to make all laws which shall be necessary and proper to carry into execution" the power of suspension, Congress may pass any law necessary and proper to secure or obtain this end, unless expressly prohibited therefrom by the constitution itself. *Id.*
7. Congress has power to protect officers and persons engaged or concerned in making arbitrary arrests and imprisonments, or arrests or imprisonments without ordinary legal warrant or cause, under the authority or in pursuance of an act suspending the writ of habeas corpus, by the passage of laws indemnifying such officers and persons against the ordinary legal consequences thereof, or declaring that they shall not be liable to an action or other legal proceeding therefor. *Id.*
8. *Seemle*, that an act suspending the privilege of the writ of habeas corpus, is itself a protection to the officers or persons engaged in making arrests and imprisonments thereunder, against any action or proceeding therefor by the party arrested or imprisoned. *Id.*
9. The President of the United States has no power to suspend the privilege of the writ of habeas corpus, except as authorized and directed by Congress and therefore the proclamation of September 24, 1852, (13 Stat. 730), so far as it undertakes to suspend such privilege, was unauthorized and void. *Id.*

10. The act of Congress of March 3, 1863, (12 Stat. 755), authorizing the President to suspend the privilege of the writ of habeas corpus, and the proclamation of September 15, 1863, (13 Stat. 134), suspending the same in certain cases in pursuance of said act, do not justify or protect the defendant in causing the arbitrary arrest and imprisonment of the plaintiff, because not done in pursuance of the special authority or order of the President as by said act provided, but by the defendant of his own will and judgment, as a matter necessary as he conceived to preserve the public peace in his department. *Id.*
11. Neither does the act of May 11, 1866, (14 Stat. 46), furnish a defence to the action for the false imprisonment by the plaintiff, because in causing the arrest and imprisonment of the plaintiff, the defendant did not act under the order of "the President or Secretary of War" or other person but in obedience to what was deemed public necessity. *Id.*

FORFEITURE.

1. Sections 2 of the act of 1838 (5 Stat. 304), and 1 of the act of 1852, (10 Stat. 61), which give penalty against a steamboat navigating the waters of the United States in violation of those acts, do not forfeit any interest in said boats for such violations; but only give the United States a right to collect such penalty by a proceeding *in rem* against the offending boat, and until a seizure in such proceeding, the United States has no lien upon or interest in such boat, by reason of such violation. *The Ranier*, 438.
2. On an indictment for smuggling, the defendant's recognizance was forfeited for failure to appear for trial according to the condition thereof; afterwards the defendant appeared and submitted to a trial, but the jury being unable to agree, were discharged without giving a verdict; on an application by such defendant, under section 6 of the act of February 28, 1839 (5 Stat. 322), to the Court for the remission of such forfeiture: *Held*, that it appearing to the Court that the defendant was guilty of the crime charged, and that the amount forfeited was not commensurate with the punishment deserved, that public justice required the forfeiture to be enforced. *U. S. v. Mercer et al.*, 502.

Of wages. See CONTRACTS, 2, 3, SEAMEN, 1, 2, REVENUE, 1, 2, 8.

FRAUD.

See ATTACHMENT, 1, 2, BANKRUPTCY, 4, 5, 6, 13, 18, 30, 38, 39, 44, 51, 52;
ARREST, 4.

FRAUDULENT CONVEYANCE.

See MARRIED WOMEN.

GRANT.

See LANDS, PUBLIC.

HABEAS CORPUS.

1. The term *State*, as used in section 1 of the act for the government of seamen in the merchant service (1 Stat. 131), includes a territory of the United States. *In re Bryant*, 118.
 2. The agent of the master in shipping a crew cannot also act as the agent of a seaman and sign his name to the shipping articles, and in such case the seaman is not liable to be arrested for desertion, under section 7 of the act aforesaid. *Id.*
 3. *Seem*, that a seaman is liable for desertion under section 7 aforesaid, who has signed a contract for a voyage containing the particulars specified in section 1 of the act aforesaid, although such voyage is not undertaken to a foreign port nor in a vessel of fifty tons burthen, and to a port in a State other than an adjoining one from the port of departure. *Id.*
- See FALSE IMPRISONMENT, 5, 6, 7, 8, 9, 10; PARENT AND CHILD; JURISDICTION, 10, 11.

HEIRS.

See COVENANT, 5.

HIGHWAYS.

See DEDICATION, 4, 7.

HUSBAND AND WIFE.

See MARRIED WOMEN.

IMMORAL COPYRIGHT.

See COPYRIGHT.

IMPRISONMENT.

See ARREST, 2, 3, 4.

INDICTMENT.

See CRIMINAL LAW, 1, 9, 10.

INJUNCTION.

1. Section 10 of the act of March 2, 1867 (14 Stat. 152), amends section 19 of the act of July 13, 1866 (14 Stat. 475), by adding thereto as follows: "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any Court." *Held*, that this prohibition included a suit to restrain the collection of any sum by authority of the United States, having the form and color of a tax, by any means authorized by law for the collection of taxes. *Howland v. Angell et al.*, 413.

See COPYRIGHT, 1, 2; EQUITY, 5, 6, 7, 8, 9; CORPORATION, 3, 4, 9.

INSOLVENCY.

See CORPORATION, 5, 6.

JETTISON.

See ADMIRALTY, 4, 5.

JUDICIAL KNOWLEDGE.

See BANKRUPTCY, 26; EVIDENCE, 1, 2.

JURISDICTION.

1. The decree pronounced by the Supreme Court of the late Territory of Oregon, at the term of June, 1854, in the suit of *Parrish v. Lownsdale Coffin and Chapman* is void, because neither party to the suit had any interest in the land in controversy by which the Court could obtain jurisdiction to make the same. *Lownsdale v. City of Portland et al.*, 1.
2. The decree in the Parrish suit was not a decree *in rem*, but *in personam*, and the manner of pleading it cannot change its character in this respect. *Id.*
3. The Act of Congress of August 14, 1848 (9 Stat. 323), organizing the Territory of Oregon did not extend the Act of May 23, 1844 (5 Stat. 657). Commonly called the Town Site Law, over the Territory; but the first Act of Congress affecting the title or disposition of lands in Oregon was that of September 27, 1850, (9 Stat. 497) commonly called the Donation Act. *Id.*
4. Where both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case, on account of the character of the parties thereto. *Hinckley v. Byrne et al.*, 224.
5. Where the action is between a citizen of a State and the subject of a foreign State, the Court has jurisdiction, on account of the character of the parties, without a reference to the fact of which of them is plaintiff or defendant. *Id.*
6. Notwithstanding the order of a State Court allowing a petition for removal of a cause to an United States Circuit Court, the National Court must determine for itself the question of its jurisdiction, and if it appears that any of the defendants, are not entitled to such removal, the cause as to them must be remanded. *Field v. Lownsdale, et al.*, 288.
7. An application to a State Court for removal of a cause need not be made at the same time by all the defendants, though under the construction given to section 12 of the Judiciary Act (1 Stat. 79), all the defendants must have been entitled to such removal. *Id.*
8. Certain defendants not served or appearing in the State Court when an order of removal was made, are not affected by it, and as to them the cause is still pending in that Court, and must be removed by its order upon the petition of such defendants, before they can come into the national Court. *Id.*
9. The act of July 27, 1866 (14 Stat. 306), gives each defendant in a cause the right of removal without reference to the *status* of his co-defendant, "if the suit is one in which there can be a final determination of the controversy," so far as it concerns him, without the presence of the other defendants, as parties in the cause." *Id.*

10. A suit to quiet title to real property against several defendants, who, as alleged in the bill, claim to be the owners of the same as tenants in common, "is one in which there can be a final determination of the controversy," as to each defendant, without the presence of the other, as a party in the cause, and therefore within the act of July 27, 1866, aforesaid. *Id.*
11. Section 14 of the Judiciary Act (1 Stat. 81), which authorizes the Courts of the United States to issue writs of habeas corpus, is not restrained in its operation by the proviso thereto except in the case of prisoners in jail under or by color of the authority of a State of the United States, in which case the writ can only issue to bring the prisoner into Court to testify. *Bennett v. Bennett*, 299.
12. According "to the usages and principles of law," mentioned in section 14 of the Judiciary Act, the power thereby given to the District Court to issue writs of habeas corpus, may be exercised by the judge thereof at Chambers. *Id.*
13. The act of July 27, 1866 (14 Stat. 306), gives each defendant in a cause the right of removal, without reference to the *status* of his co-defendants, "if the suit is one on which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants, as parties in the cause." *Fields v. Lamb et al.*, 430.
14. The act of March 2, 1867 (14 Stat. 558), does not in any particular repeal the act of 1866, *supra*, but is supplemental thereto, and adds another cause for removal of cases from the State to the National Courts. *Id.*
See BANKRUPTCY, 28; DIVORCE, 1, 2; EQUITY, 4, 5, 9; PARENT AND CHILD.

JURY.

See CRIMINAL LAW, 8, 9, 10, 11, 15; EVIDENCE, 6, 7, 9, 10.

LANDS, PUBLIC.

1. A settler on the public lands in Oregon—prior to September 27, 1850—held the mere possession thereof under what was known as the "Land Law" of the "Provisional Government of Oregon;" the interest of such settler in the land ceased with his occupation, and when he abandoned or transferred the possession to another, that other took it as though it had never been occupied; nor could the first settler, by any act of his, charge such lands, in the possession of the second one, with any easement or incumbrance whatever. *Lounsedale v. City of Portland et al.*, 1.
2. The act of May 23, 1844 (5 Stat. 657), commonly called the Town Site Law, was not in force in Oregon prior to the passage of the act of July 14, 1854 (10 Stat. 305), and an entry and patent in pursuance of it, to land settled upon prior to that time under the Donation Act of September 27, 1850 (9 Stat. 496), is simply void. *Chapman v. School District, No. 1 et al.*, 108.
3. The Donation Act was the first law of Congress affecting the public lands in Oregon, and it is a grant in the present and gives the fee simple to the donee thereunder from the date of his settlement; but, "until the

- complete performance of the conditions subsequent to such settlement, the estate granted is a base or conditional fee and liable to be defeated and revert to the donor by a failure to perform such conditions. *Id.*
4. The right of the settler under the Donation Act to the land claimed by him, ultimately depends upon the settlement and the performance of the subsequent conditions of residence, cultivation, and proof. *Id.*
 5. The patent to the settler is conclusive evidence of the performance of such conditions in a Court of law and *prima facie* in a Court of equity; but such patent cannot limit or restrain the estate granted by the act, which vests in the donor independently of and prior to the issuing thereof. *Id.*
 6. A grant under section 4 of the Donation Act (9 Stat. 497), to the children of Nancy Lownsdale, the wife of a settler under such section, includes the children of said Nancy, by a prior husband. *Lamb et al v. Starr et al.*, 350.
 7. The Donation Act does not declare who are the heirs of a settler or his wife, under section 4 thereof, upon the death of either, before the issuing of a patent, and the grant over in case of such death to the "children or heirs" of such settler or wife, ought to be construed to take effect first in favor of the former. *Id.*
 8. Under the Donation Act, a settler upon the public lands in Oregon, might change his location and settlement as often as he saw proper, before making final proof and receiving a certificate, and in case of his death before the completion of his residence and cultivation, his widow might abandon her interest in his donation, and by becoming the wife of another settler, be entitled to receive one half of the donation of the latter husband. *Id.*
 9. The Donation Act does not include settlers upon the public lands, who died before its passage—September 27, 1850. *Id.*, and *Fields v. Squires et al.*, 366.
 10. In the year 1860, Lownsdale being the owner of one fifth of Nancy's share of their donation as above stated, purchased the interest of Isabella Ellen one of Nancy's children and died intestate, in 1862, leaving children; in 1864, the proper Court of the State partitioned said Nancy's share of the donation, by giving three fifths thereof to the three children of Nancy, and the other two fifths to the heirs and vendees of said Lownsdale, and because of the inequality of said partition, required the two fifth tract to pay a certain amount of owelty to said children of Nancy: *Held*, that by this partition, Nancy's three children were divested of their interest in the two fifth tract, and Lownsdale's heirs were divested of their interest in the three fifth tract, and that Lownsdale's prior vendees of any particular parcel in this two fifth tract neither gained or lost by this partition, but can only claim that interest therein which their deeds from Lownsdale entitle them to, discharged from the owelty. *Fields v. Squires et al.*, 366.
 11. One half of the land taken by a married settler, under the Donation Act, be it more or less, enures to the benefit of the wife; and she takes the same in her own right, as the direct donee of the United States, and not subject to any of the previous acts or contracts of the husband. *Id.*

12. A grant to a settler under the Donation Act, does not take effect prior to the passage of such act, although made in consideration, or on account of prior residence and cultivation thereon. *Id.*

See COVENANTS, 3, 4, 5, 8.

LANDLORD AND TENANT.

1. A tenancy from year to year is not a tenancy at *will*, but for a *term*—a prescribed and certain time. *Parrott v. Barney et al.*, 405.

LOTTERY.

See REVENUE, 14, 15, 16.

MANUFACTURER.

Who is, See TAXES, 3; REVENUE, 11.

MARRIAGE.

See DIVORCE; MARRIED WOMEN.

MARRIED WOMEN.

1. Prior to February 14, 1859, while Oregon was a territory, the common law being in force therein, the husband by reason of the marriage became seized of a freehold estate in all the lands in which his wife had an estate of inheritance during the coverture, which could be taken in execution by his creditors. *Starr v. Hamilton et al.*, 268.
2. The Constitution of Oregon, which went into effect February 14, 1859, provides (Art. XV, § 5) that certain property of every married woman "shall not be subject to the debts or contracts of the husband:" *Held*, that this provision had the effect as to third persons at least, to make such property thereafter the wife's separate property. *Id.*
3. The separate property of a married woman is that of which she has the exclusive control and benefit, and its character as such must be imparted to it by the instrument or power by which the wife acquires the property. *Id.*
4. Property conveyed to a wife and her heirs by her then husband, by an ordinary deed which contains no terms, from which it appears that it was the intention of the grantor to exclude the husband, as such, from the benefit and control of it, is not, by operation of such deed, her separate property. *Id.*
5. The constitutional provision aforesaid concerning certain property of married women was not intended to operate retroactively, so as to affect rights already vested in the husband; and by Article XVIII, § 10, of the Constitution, is prevented from so doing, if it otherwise would. *Id.*
6. Marriage is not a contract within the purview of the National Constitution but a civil institution or relation, to be regulated and controlled by law, so far as the rights of the parties thereto in the property of each other is concerned; and until these become vested interests, the legislative power may regulate the subject from time to time, to suit the wants of

society, or the interests of the parties to the relation—therefor the provision aforesaid in relation to the property of married women applies to marriages existing when it went into force, so far as after acquired property is concerned. *Id.*

7. Money loaned by the wife to her husband in 1857, which came to her by the sale of real property inherited before that time, was, by virtue of the marriage, the property of the husband, and therefore where property was afterwards purchased by the husband and the conveyance therefor taken to the wife for the ostensible purpose of reimbursing the latter, it is a gift from the husband, and not a purchase by the wife. *Id.*
8. A gift to the wife from the husband, he acting in good faith and being solvent at the time, is within the provision of the Constitution of Oregon (Art. XV, § 5) concerning the property of married women, and is therefore not "subject to the debts and contracts of her husband." *Id.*
9. Where the wife purchased real property with money received from the sale of her property, but which had become the husband's by virtue of the marriage, and took a conveyance to herself: *Held*, that although this was in effect a voluntary conveyance from the husband to the wife, it was valid, if the husband was solvent at the time, and it was not made with intent to defraud subsequent creditors. *Dick v. Hamilton et al.*, 322.
10. It is not to be presumed that a creditor of the husband's trusted him upon the faith of property, which, although occupied by him in conjunction with his wife, appeared from the registry of deeds to have been at the time the property of the wife. *Id.*
11. A subsequent creditor has no claim on the property of the wife for money expended thereon, unless it appear that it was so expended with intent to defraud such creditor. *Id.*
12. A conveyance of real property to the wife by a third person in consideration of a release of a right of dower by the former in certain other property, is a conveyance upon a consideration moving from the wife, and valid as against the existing or subsequent creditors of the husband. *Id.*
13. Where an insolvent husband lived with his family in the house of his wife, and during the time made repairs thereon, so as to keep it habitable: *Held*, that the property was not liable to the creditors of the husband for the value of such repairs. *Id.*
14. At common law a married woman is incapable of contracting a personal obligation, and therefore a conveyance of real property to one in consideration of her promissory note for the purchase money is in effect a gift to her. *Id.*
15. Where real property is conveyed to the wife, to hold the same free from the control of her husband and for her own separate use, it becomes, by force of the terms of the conveyance, her separate property, and the husband as such has no right in or to it. *Id.*
16. A conveyance to the wife, the husband being insolvent, in consideration of a promissory note signed by the husband and wife and secured by a

mortgage on the separate property of the latter, ought, unless the contrary is shown, to be presumed to have been made upon the faith of such security. *Id.*

See COVENANT 5.

MESSENGER.

See BANKRUPTCY, 2, 3.

NEGLIGENCE.

See COMMON CARRIER, 2, 3, 9; PLEADINGS, 3; ADMIRALTY, 4, 5.

NUDUM PACTUM.

1. A bond made by Lownsdale and Coffin, on November 26, 1849, for a deed to a lot, upon the sole consideration that the obligors therein—"the trustees of the school and meeting house of Portland, and their successors in office"—should do and perform certain things in the condition thereof written, is a mere gratuitous promise, until performance or an accepted promise of performance of such condition, and therefore will not be enforce against the obligors in equity. *Chapman v. School Dit. No. 1, et al.*, 139.

See CONTRACTS; SEAMEN, 3.

OFFICER.

Military, when protected in making illegal arrests. See FALSE IMPRISONMENT.

Civil, See TENURE OF OFFICE.

ONUS PROBANDI.

See COMMON CARRIER, 1, 5, 6, 9.

ORGANIC ACT.

1. The Act of Congress of August 14, 1848 (9 Stat. 323), organizing the Territory of Oregon, did not extend the Act of May 23, 1844 (5 Stat. 657), commonly called the Town Site Law, over the Territory; but the first Act of Congress affecting the title or disposition of lands in Oregon was that of September 27, 1850, (9 Stat. 497), commonly called the Donation Act. *Lownsdale v. City of Portland et al.*, 1.

See CONSTRUCTION, 1; LANDS PUBLIC.

PARENT AND CHILD.

1. Where one person claims the legal right to have the custody of an infant child, and that right is denied and the custody of such child withheld by another, this constitutes a *controversy* within the purview of the Constitution of the United States (Art. III, § 2), and if the parties thereto be citizens of different States, it is a controversy within the judicial power of the United States to hear and determine by the proceeding known as the writ of habeas corpus. *Bennett v. Bennett*, 299.

See DIVORCE, 1.

PARTITION.

See EQUITY, 1, 2; LANDS PUBLIC, 10.

PATENT.

1. A mode of inserting detachable teeth in circular saw plates upon circular lines, so as to distribute the strain caused by the point of the tooth pressing upon the wood, over the whole surface of the socket or recess in which such tooth is inserted and thereby prevent the plate from cracking, is a patentable invention. *Spaulding v. Tucker*, 649.
 2. A patent is not allowed for the mere exercise of mechanical skill; the patentee must add something to what was previously known or used. *Id.*
 3. If, after a patentee has conceived the idea of his invention, and while he is in process of developing and testing it, a third person should make suggestions to him similar to the conception already in his mind and upon which he was then experimenting, such suggestion would not affect the originality of the discovery or the validity of the patent. *Id.*
 4. Credibility of witnesses a matter of fact for the jury. *Id.*
 5. Letters patent are *prima facie* proof of the priority of the patentee's invention, and that it is both novel and useful. *Id.*
 6. After a patent has become valuable and the subject of controversy, the testimony of a witness who states, that at a particular time and place long past, he suggested to the patentee the fundamental idea of his invention, should be acted upon by a jury with care. *Id.*
 7. The opinions of mechanical experts are not facts which bind the jury upon a question of identity of improvement or construction, but the jury must judge for themselves and find the facts accordingly. *Id.*
 8. Damages for infringement to be proved, not guessed at. *Id.*
- As title to land, See LANDS PUBLIC, 5; See COPYRIGHT.

PENALTY.

See FORFEITURE, 2; ARREST, 4.

PERJURY.

See CRIMINAL LAW, 1, 3.

PETITION.

See BANKRUPTCY, 2, 9.

PILOTS.

1. When a warrant to act as pilot appears upon its face to have been regularly issued, its validity cannot be questioned collaterally, or in a suit between third persons. *The Panama*, 27.
2. The possession and exhibition of the warrant authorize the master of a ship to treat the holder as a duly constituted pilot; and, as between third persons, is conclusive evidence that the conditions which the law attached to the appointment have been complied with. *Id.*

3. Pilotage being "a rightful subject of legislation," the Territory of Washington has power to pass pilot laws. *Id.*
4. The Act of August 7, 1789 (1 Stat. 54), is not a grant of power to the States to pass pilot laws, but a legislative recognition that the power is concurrent in the State and the United States until exercised by the latter. *Id.*
5. Does the Act of March 2, 1837 (5 Stat. 153), include a territory? *Query.*
6. Whenever Congress exercises the power of passing laws on the subject of pilotage, so far the power becomes exclusive; and all prior laws of the States within the purview of such enactments are at once abrogated and cease to have effect. *Id.*
7. The Act of August 30, 1852 (10 Stat. 75), provides for the employment of pilots on vessels propelled in whole or part by steam, engaged in carrying passengers on any of the bays, lakes, rivers, or other navigable waters of the United States. *Id.*
8. This Act, so far as it goes, supersedes all State laws regulating the employment of pilots on this class of vessels. *Id.*
9. In the construction of the Act of Congress of 1852, its operation is not to be restrained or limited because of the pre-existence of State laws regulating the employment of pilots under like circumstances. *Id.*
10. There is no presumption that Congress did not intend to abrogate the State law; but, on the contrary, the power over the subject being paramountly in Congress, and only permitted to the States by suffrage, in case of conflict between the two the presumption is the other way. *Id.*
11. The Pilot Act of the territory of Washington—January 26, 1863—authorized certain pilots to take charge of vessels bound in or out of the Columbia river, provided such pilot "shall first show the master his warrant." *Held*, that the exhibition of the warrant to the master was a necessary part of the tender of services, and unless the same was expressly waived, or intentionally prevented or avoided by the master, the pilot could not recover for such tender of services. *The Eldridge*, 176.
12. By the act of February 25, 1867 (14 Stat. 411), a sea-going steam vessel, subject to the navigation laws of the United States, when navigating any of the waters thereof, is required to be in charge of a pilot licensed by the inspectors of steam vessels, but such act is cumulative, and does not annul or supersede a State law requiring that such pilot when piloting such vessel within the limits of the State, should also be licensed by the Pilot Commissioners of the State. *The George S. Wright*, 591.
13. Claims for half pilotage for offer and refusal of services, are cases of admiralty jurisdiction, and a suit therefore may be maintained against the vessel or master; and a State Statute which provides that in a certain contingency the consignee shall also be liable therefor, does not affect the jurisdiction in admiralty, but only gives an additional remedy against a third person. *Id.*
14. Suggestions as to the regulations of pilot fees by Congress rather than the State. *Id.*

PLEADINGS.

1. Where an answer to a bill in equity is excepted to for impertinence, if the matter excepted to be in response to the bill, the exception will not be allowed, though the matter be impertinent. *Lovnsdale v. City of Portland et al.*, 1.
2. Exception for impertinence to an allegation in an answer which serves no legal purpose, and is a mere slur upon the libellant, allowed. *The Pioneer*, 58.
3. An allegation of misconduct on the part of an engineer as a cause of forfeiture of wages must state the particular acts of misconduct relied on, with the circumstances of time and place. *Id.*
4. C. brought suit against the steamboat P. for wages as engineer; the claimant in its answer set up that prior to the commencement of such suit, it had commenced an action against C. in the Territory of Washington, to recover damages for injuries to the steamboat P., caused by the misconduct of the latter as engineer thereon, and caused a garnishee process to be served upon K., the master, and sometime owner of the steamboat P. during the period that C. was employed upon her as engineer: *Held*, on exception that the allegation was impertinent. *Id.*
5. Under the Oregon Code, a defendant in ejectment cannot avail himself of an estate in the premises, in himself or another as a defence, unless the fact is pleaded. *Hall v. Austin*, 104.
6. A detailed statement of matters which might be evidence in support of a plea of title in the defendant, is not a proper or sufficient plea of such title, and will be stricken out on motion, as redundant. *Id.*
7. An alleged equitable interest or right in the defendant in an action of ejectment, is no defence to such action. *Id.*
8. Section 72 of the Oregon Civil Code, which gives the defendant a right to plead as many several defences to an action as he may have, is similar to 4 Anne C. 16, §4, allowing double pleas, and should be similarly construed, so as to permit the defendant to plead inconsistent or contradictory defences to the same action. *Id.*
9. Exceptions to an answer in equity for impertinence are only allowed where it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. *Chapman v. School District No. 1 et al.*, 108.
10. An allegation in an answer, however evasive or insufficient, which is responsive to the bill, is not liable to exception for impertinence. *Id.*
11. A defendant in a suit in equity cannot by means of his answer, obtain any relief concerning the subject matter of the suit, and a prayer therefor in such answer is impertinent. *Id.*
12. Matter in abatement of a suit in equity cannot be alleged by way of answer, but must be set up in a plea. *Id.*
13. An exception for impertinence must be allowed in whole or not at all. *Id.*

14. In a suit for forfeiture of a vessel under section 50 of the Collection Act (1 Stat. 665), it is not necessary to allege or prove that the goods unladen were of foreign growth or manufacture, but simply that they were brought in such vessel from a foreign port or place. *The Active*, 165.
15. An allegation in a libel that goods were unladen from a vessel within the collection district of Oregon, is equivalent to an allegation that they were unladen within the United States—it being judicially known that such district is a part of the territory and within the limits of the United States. *Id.*
16. In such suit, an allegation that the goods unladen were worth \$5,000, without saying at what place, port or district, is not sufficient; but it is not necessary to allege that the unlading was at port; any place or district within the United States is sufficient. *Id.*
17. An exception, that a libel does not state facts sufficient to constitute a cause of suit or forfeiture is too general; it should state in what particular the facts are insufficient. *Id.*
18. In an action *ex delicto*, a plea in abatement by one defendant, to the effect that the Court has not jurisdiction of his co-defendant, is bad on demurrer. Such objection is personal, and cannot be made by one defendant for another. *Hinckley v. Byrne et al.*, 224.
19. An action of ejectment against several defendants is in effect a separate action against each of them, and an objection to the jurisdiction of the Court on account of the *status* of a particular defendant, can only be taken by such defendant for himself. *Id.*
20. An allegation in a plea in abatement that all the defendants in an action are not citizens of California, is bad on demurrer for uncertainty; the plea should state which of such defendants are not such citizens. *Id.*
21. It need not be stated in a pleading, that an alleged trust concerning lands was created by writing, and it will be presumed to have been so created until the contrary appears; the Statute of Frauds, which requires such trusts to be created or evidenced by writing, is a rule of evidence, but not of pleading. *Lamb et al. v. Starr*, 350.
22. A demurrer which states a fact not appearing on the face of the pleading demurrer to, is a speaking demurrer, and will be overruled. *Id.*
23. In equity a defendant is not entitled to plead more than one plea, without leave of the Court, and such leave will only be given when the necessity therefor is obvious. *Id.*
24. Where a demurrer is taken to the complaint, if either count therein is good, it must be overruled. *Parrott v. Barney*, 405.
25. An allegation that the defendants held certain premises as tenants thereof to the plaintiffs under a demise to them for a certain rent, imports a tenancy for a term. *Id.*
26. In an action for a penalty given by statute, the complaint must state that the act or omission by which it was incurred was done or omitted contrary to the statute. *Briscoe v. Hinman*, 588.
27. In an action for a penalty by a private person, the complaint must allege the right of the plaintiff to sue therefor. *Id.*

28. In an action against a collector of customs for the penalty given by section 24 of the Steamboat Act of 1852 (10 Stat. 71), it must appear from the complaint, with reasonable certainty as to time and place, that the vessel was engaged in carrying passengers while navigating the waters of the United States. *Id.*
 29. The allegations that a vessel was engaged in carrying passengers between January 1 and May 1, 1868, and that on certain trips such vessel carried goods or passengers, are bad for certainty. *Id.*
- See COMMON CARRIER, 5; POSTMASTER; EQUITY, 3; TENURE OF OFFICE, 7.

POSSESSORY RIGHT TO LAND.

See LANDS PUBLIC, 1; COVENANTS, 3.

POSTMASTER.

1. In an action by the United States on a postmaster's bond, the defendant may plead a counter claim, if it appear from such plea that the items thereof have been duly presented to the proper department for allowance, and rejected. *U. S. v. Davis et al.*, 294.
2. The act of June 22, 1854 (10 Stat. 293, 299), authorizes the Postmaster General in his discretion to make an extra allowance to postmasters for extra labor and expense in certain cases: *Held*, that no postmaster has a right to such allowance until it is made him by the Postmaster General—and that the action of the latter in the premises is final, and not subject to judicial review. *Id.*
3. A plea of counter claim for certain extra services and expenses incurred by a postmaster under the act aforesaid, or the one of July 1, 1864 (13 Stat. 335), should show that the office kept by the defendant was within the act authorizing an allowance on such accounts. *Id.*
4. The provision of the act of July 1, 1864 (13 Stat. 335, § 5), which enacts that "the Postmaster General, *shall* allow to the postmaster, a just and reasonable sum for the necessary cost *in whole or in part* of rent, fuel," etc., is in effect, permissive and not mandatory, and no postmaster has any legal right to such allowance until it is awarded him by the Postmaster General. *Id.*

See CRIMINAL LAW, 17.

PRESUMPTION.

See EVIDENCE, 6, 7; CRIMINAL LAW, 11, 12, 13, 14, 16; VERDICT, 1.

PRIVIES IN ESTATE.

1. When a deed is made to trustees of a school and meeting house for the use of the citizens of a town, and afterwards a School District is incorporated embracing the same citizens, the School District is not by virtue thereof the successor of or privy in estate with the trustees. *Chapman v. School District No. 1 et al.*, 139
2. A city embracing the same citizens, incorporated after such deed is executed, is not the successor of or privy in estate with such trustees. *Id.*

See ESTOPPEL, 1.

PROOF.

Of Debts in Bankruptcy, See *BANKRUPTCY*, 18, 19, 20, 21, 22, 30, 31.
 Burden of, See *Onus Probandi*.

PUBLIC POLICY.

Contracts void, when against, See *CONTRACTS*, 4.

RECORDS OF STATE COURTS.

How authenticated, to be admissable in United States Courts. See
EVIDENCE, 3.

RECOGNIZANCE.

See *FORFEITURE*, 2.

RELEASE.

See *DEDICATION*, 1, 2, 8.

REMOVAL.

From office, See *TENURE OF OFFICE*.

Of action from State to United States Courts, See *JURISDICTION*, 5, 6, 7,
 8, 12, 13.

REVENUE.

1. Goods of whatever growth or manufacture brought from a foreign port or place and landed at a port or place within the United States without a permit, are forfeited to the United States under section 50 of the Collection Act (1 Stat. 665). *Ten cases of Opium*, 62.
2. Foreign goods once lawfully admitted into the United States, if re-exported or voluntarily placed within the limits of a foreign jurisdiction, loose the character imparted to them by such admission, and if re-imported into the United States, it must be done in conformity with the law governing the importation of goods of a foreign growth or manufacture from a foreign country. *Id.*
3. If opium was shipped from San Francisco *via* the foreign port of Victoria to Portland, and while the ship was lying at Victoria the shipper of the opium should cause it to be taken ashore and placed in a house in Victoria, for even a few hours, or less time, and then cause it to be re-laden upon the ship and brought thence to Portland, such opium would be brought from a foreign port and liable to become forfeited by being landed without a permit. *Id.*
4. The importer or consignee of imported goods is personally liable for the duties charged thereon. *U. S. v. Dodge*. 124.
5. An importation is complete when the goods arrive at the proper port of entry, and the duties accrue at that time, and not at the time of the subsequent entry at the custom house. *Id.*

6. In 1864 there were no public stores or bonded warehouses in the district of Oregon, and therefore goods imported into such district, before June 30 of that year, could not come within the description or operation of section 19 of the act of that date (13 Stat. 216). *Id.*
7. Section 50 of the Collection Act does not apply to an unloading of goods brought from a foreign port, within the limits of the United States, but unladed before the vessel has arrived at any port or place within a collection district; such a case falls within section 27 of said act. *The Active*, 165.
8. Section 63 of the act of July 13, 1866 (14 Stat. 169), which provides that a person claiming goods which have been seized as forfeited under the Internal Revenue Act, must give bond to the collector for costs and expenses, etc., is not compulsory, and does not prevent the owner of goods which he alleges to have been seized unlawfully, for maintaining an action against the seizing officer for the damages occasioned by the trespass. *Cardinell et al. v. Smith et al.*, 197.
9. By section 70 of the act of July 13, 1866 (14 Stat. 173), it is in effect provided that canned goods in the hands of the manufacturer, on and after August 1, 1866, shall pay a duty; and by the same act (14 Stat. 144), it is declared that a retail or other dealer in such goods, for all the purposes of taxation, "shall be deemed the manufacturer thereof;" while in schedule C (14 Stat. 145), it is provided that such goods when "made, prepared, and sold or offered for sale or removal for consumption in the United States, on or after October 1, 1866," shall be liable to a stamp duty: *Held*, that a retail or other dealer who offered such goods for sale after August 1, 1866, was to be deemed and held the manufacturer thereof, and that such goods were liable to pay a duty, and if offered for sale without the payment thereof, were forfeited to the United States. *Id.*
10. Where the intention of the Legislature is in some particular ambiguously expressed, it is the duty of the Court so as to construe its act so as to make it harmonize in such particular with the general purpose, plainly expressed. *Id.*
11. When an act (14 Stat. 144), declares that dealers in canned goods, under certain circumstances, "shall be deemed the manufacturers thereof," it is equivalent to declaring that such dealers shall be treated and held liable as if they were manufacturers, notwithstanding they are not such in fact. *Id.*
12. If a deputy collector of internal revenue fails to pay over, to his principal, taxes collected by him, under the proviso in section 67 of the act of July 13, 1866 (4 Stat. 172), the Circuit Court of the United States has jurisdiction of an action by the collector upon the bond of said deputy to recover the amount of such taxes. *Crawford v. Johnson et al.*, 457.
13. A collector of internal revenue is considered as receiving an "injury to his property," on account of an "act by him done," within the meaning of the proviso aforesaid, when a deputy appointed by him embezzles the taxes given him for collection. *Id.*
14. Where 600 parcels of land were sold for the uniform price of \$50 each, to be distributed among the purchasers by lot, and 300 of such parcels were

not worth more than \$50 each, and the other 300 were worth from \$100 to \$5,000 each: *Held*, that the scheme was a lottery, and the manager thereof a dealer in lottery tickets, and liable to pay a license as such. *U. S. v. Olney*, 461.

15. The term lottery—definitions of. *Id.*

16. A revenue law is to be liberally construed, so as to attain the end for which it was enacted. *Id.*

See ACTION; CRIMINAL LAW, 2; ARREST, 4; PLEADINGS, 15, 16; VERDICT, 2.

REVENUE STAMP.

On instrument, when and where may be affixed after execution,
See EVIDENCE, 4.

On merchandise, See EVIDENCE, 8; ARREST, 4; REVENUE, 9.

SALE.

Of Liquors without license, See CRIMINAL LAW, 6, 7.

SALE OF SHIP.

1. A sale of a vessel to a corporation organized and existing under the laws of a foreign country, is a sale "to a subject or citizen of a foreign prince or State," as the case may be, within the meaning of section 16 of the Registry Act (1 Stat. 295), without reference to the nationality or citizenship of the shareholders therein. *The Maria*, 89.
2. But if such corporation were not a subject within the purview of such section, then if any of the shareholders therein were such subjects, such sale would be thus far, and therefore "in part," a sale "to a subject or citizen of a foreign prince or State." *Id.*
3. A sale upon credit, and upon the condition that the purchaser, shall not use the vessel until the purchase money is all paid, and that if default is made therein, the seller may retake the vessel into his possession, is a sale within such section 16. *Id.*
4. Sale of vessel to a subject of a foreign prince, how and by whom made, known, and upon whom, is the burden of proof concerning the omission to make such sale known. *Id.*
5. Upon the sale of a vessel to such subject, she is no longer entitled to the benefit of her American register; and if she is afterwards navigated thereunder, it is a violation of section 27 of the Registry Act (1 Stat. 298). *Id.*
6. Where the owner of a vessel makes a bill of sale thereof without consideration, to another, and retains the possession of such vessel, for the purpose of fraudulently obtaining an American register for the same, such transaction is a nullity, and does not vest any legal title or right in the pretended vendee, so as to authorize the statement in the oath for a register under section 4 of the act of December 31, 1792 (1 Stat. 287), that he is the true and only owner thereof. *The Fideliter*, 620.

7. A sale of a British vessel by an American citizen to a Greek subject, at Alaska, after the ratification of the treaty of purchase with Russia, and before the country was formerly turned over to the American government, for the purpose of having such vessel thereby become an American bottom under article 3 of said treaty, is a fraud upon the American government, and an American register obtained for such vessel thereon, is fraudulently obtained within the meaning of section 24 of the act of July 18, 1866 (14 Stat. 184). *Id.*

SEAMEN.

1. A justifiable discharge of a seaman by the master, *for bad conduct*, will work a forfeiture of the wages previously earned. *The Almatia*, 473.
2. Courts of admiralty will not forfeit a seaman's wages for a single act of disobedience, however trivial or provoked. *Id.*
3. A stipulation in shipping articles in derogation of the general rights of seamen, as established by the maritime law, is void unless it was fully and fairly explained to them, and additional compensation allowed them adequate to the restrictions and risks imposed thereby. *Id.*

See ADMIRALTY, 1, 2, 3; CONTRACTS, 1, 2, 3; ASSAULT AND BATTERY; HABEAS CORPUS, 3.

SPECIFIC PERFORMANCE.

To enforce, See COVENANT.

STATE.

The word "State" includes a Territory, See HABEAS CORPUS, 1.

STATUTES OF UNITED STATES.

- Act of January 14, 1841, See ARREST, 2.
 August 14, 1848, See CONSTRUCTIONS, 1; JURISDICTION, 2; ORGANIC ACT.
 August 30, 1852, See CONTRACTS, 3; PILOTS, 7, 8, 9, 10.
 August 18, 1856, See COPYRIGHT, 3.
 June 30, 1864, See CRIMINAL LAW, 2, 6; REVENUE, 6.
 March 3, 1868, See CRIMINAL LAW, 15.
 July 1, 1861, See CRIMINAL LAW, 17.
 September 27, 1850, See DEDICATION, 3, 9, 10; ORGANIC ACTS; LANDS, PUBLIC, 1, 2, 3, 4, 6, 7, 8, 9, 11, 12, 13; JURISDICTION, 3.
 March 3, 1863, See DISTRICT ATTORNEY, 1, 2; FALSE IMPRISONMENT, 10.
 March 2, 1799, See DISTRICT ATTORNEY, 3.
 May 6, 1790, See EVIDENCE, 2, 3.
 July 13, 1866, See EVIDENCE, 4; INJUNCTION; REVENUE, 8, 9, 12; TAXES, 1, 3; VERDICT, 2.
 May 11, 1866, See FALSE IMPRISONMENT, 11.
 February 28, 1839, See FORFEITURE, 2.
 March 2, 1867, See INJUNCTION; JURISDICTION, 13.

- May 23, 1844, See JURISDICTION, 2; ORGANIC ACT.
 July 27, 1866, See INJUNCTION, 8, 9, 12, 13; LANDS PUBLIC, 2.
 August 7, 1789, See PILOTS, 4.
 March 2, 1837, See PILOTS, 5.
 February 25, 1867, See PILOTS, 12.
 June 22, 1854, See POSTMASTER, 2.
 July 1, 1864, See POSTMASTER, 3, 4.
 December 13, 1792, See SALE OF SHIPS, 6.
 July 18, 1866, See SALE OF SHIPS, 7.
 July 1, 1862, See TENURE OF OFFICE, 1.

STEAMBOATS.

1. Unlicensed Engineer on, cannot recover wages. *The Maria*, 89.
 See PILOTS, 12, 13; PLEADINGS, 4; CONTRACTS, 3; FORFEITURE, 1.

TAXES.

1. Section 19 of the Act of July 13, 1866 (14 Stat. 152), declared that no suit should be maintained for the recovery of any tax illegally assessed or collected until after an appeal to the Commissioner of internal revenue: *Held*, that in an action against a collector to recover a tax alleged to have been so assessed and collected, a failure by the plaintiff to take such appeal must be pleaded by the defendant in abatement of the action, and unless it is, he will be deemed to have waived the objection. *Hendy v. Soule*, 400.
 2. When taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property, to make the payment involuntary. *Id.*
 3. The plaintiff was the owner of a patent for the exclusive manufacture and sale of a certain "*Concentrator*," and employed others to construct the machines for him at so much a piece, and then sold them at about 100 per centum advance on the price paid for their construction: *Held*, that under sections 79 and 86 of the Act of July 13, 1866 (14 Stat. 119, 122), the plaintiff was the manufacturer of such machines and liable for a tax upon the sum realized by the sale of them. *Id.*
- Fees in collection of, See DISTRICT ATTORNEY; INJUNCTION; EQUITY, 9.

TENANTS.

- Committing waste, See WASTE, 1, 2, 3.
 Possession of one, possession of all, See EQUITY, 2.

TENURE OF OFFICE.

1. The act of July 1, 1862 (12 Stat. 433), creating the office of Assessor of Internal Revenue, does not prescribe the tenure thereof, and therefore the incumbent is deemed to hold such only during the pleasure of the appointing power. *U. S. v. ex. rel. Bigler v. Avery*, 204.
2. Where Congress has the power to create an office, it may prescribe the term for which it shall be holden by the incumbent, and in such case there is no power of removal during such term. *Id.*

3. The Constitution does not expressly authorize or provide for removals from office otherwise than as a consequence of impeachment, and as an implied power "necessary and proper for carrying into execution" any power expressly vested in the government or any department or officer thereof, and therefore the power of removal can only be claimed by or attributed to the appointing power. *Id.*
4. In this case the appointing power is the President and Senate, acting concurrently, and in the absence of legislation and precedent to the contrary, it follows that the President alone has not the power of removal. *Id.*
5. By the action of the first Congress and the uniform practice on the subject, down to the time when this controversy arose, the power of removal by the President had been practically conceded by Congress, and the question being one which properly belongs to that body to regulate, its past action and acquiescence must be regarded by the Courts as establishing or evidencing a regulation on the subject. *Id.*
6. The power to regulate the subject of removals from office belongs to Congress, and that body having for three fourths of a century practically conceded the authority to the President to make removals without the advice and consent of the Senate, the Court does not feel at liberty at this late day to deny him this power. *Id.*
7. The defendant having surrendered the office in controversy, to a person duly authorized to receive it since the filing of the answer, is entitled to file a supplemental answer setting up this fact as a plea *puis darrien continuance*; and such surrender terminates the controversy except as to costs, for which the plaintiff is entitled to judgment. *Id.*

TITLE.

Cloud on, See EQUITY, 4; JURISDICTION, 9.

TOWN SITE LAW.

When extended to Oregon, See CONSTRUCTION, 1; LANDS PUBLIC, 2; ORGANIC ACT.

TRADE MARK.

See CORPORATION, 1.

VERDICT.

1. The verdict of a jury is presumed to be correct and should be sustained, if the evidence by any fair construction will warrant such finding. *U. S. v. Fox*, 575.
2. Goods are sold "in the original and unbroken package" within the meaning of the act of July 13, 1866 (14 Stat. 144), although the package is opened for inspection, if closed again before delivery without the contents being changed. *Id.*
3. When the verdict of a jury is directly contrary to the evidence and the law applicable thereto, it is the imperative duty of the Court to set it

aside, and it makes no difference in this respect that the action is brought to recover a penalty given by statute. *Id.*

4. What is called "the justice of the case" on a motion for a new trial is not affected by the fact that a moiety of the penalty recovered will go to the person who gave information of the violation of the law, whereby such penalty was incurred. *Id.*

Presumptions in favor of, See CRIMINAL LAW, 11, 12, 13, 14, 16.

How rendered on Indictment containing two or more counts and against several persons, See CRIMINAL LAW, 9, 10.

WAGES.

Forfeiture of, See SEAMEN; CONTRACTS, 1, 2, 3; ADMIRALTY, 1, 2.

WASTE.

1. The statutes of Marlebridge and Gloucester concerning waste are a part of the common law, brought to this country by the colonists from England. *Parrott v. Barney et al.*, 405.
2. The Statute of California (Prac. Act, § 250), which gives an action to the person aggrieved against a tenant who may commit waste, includes *permissive* waste. *Id.*
3. If a tenant at will commit voluntary waste he is liable not as a tenant but as a trespasser, but for mere *permissive* waste—a neglect to keep the premises in repair—he is not liable. *Id.*
4. When waste is committed by a stranger during the term of the tenant, an action on the case may be maintained therefor, either against the tenant who suffered the waste or the stranger who committed it. *Id.*

WITNESSES

Testimony of interested, See EVIDENCE, 6, 7, 10; CRIMINAL LAW, 4.

